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SOME SUGGESTIONS ABOUT FIRST INSTANCE COURTS OF GENERAL JURISDICTION

By James M. Morton, Jr.
United States District Judge
Massachusetts

Reprint of an address before
Judicial Section of American Bar Association
Philadelphia, 7 July, 1924

Two years ago the Chief Justice addressed the Association on "Possible and Needed Reforms in the Administration of Justice in the Federal Courts," dealing especially with the organization of the courts and with the appellate jurisdiction of the Supreme Court. Last year Judge Owens, of the Supreme Court of Wisconsin, spoke upon the "Efficiency of the Courts." What I have to say will to a certain extent supplement these two addresses. I propose to discuss the daily work of first instance courts of general jurisdiction. Perhaps I ought to say, as disclosing my point of view, that for the past dozen years I have been a district judge in the largest district in population in the United States, and that for ten years of that time I was the sole district judge. One accumulates experience fast under such conditions. I have sometimes felt like the small colored boy who was asked by a kindly lady how old he was. "Well, mam," he said, "ef yo goes by what mudder says, I'se seben; but ef yo goes by the fun I'se had, I'se more'n a hundred."

The problems of first instance courts are very different from those of appellate tribunals. In the lat-

ter, except when the appeal is on facts, the attention of the court is directed to the proper rule of law. Several judges work together, there is ample opportunity for reflection and consultation, they never come into contact with the parties, nor undertake to carry out the result. A first instance judge, on the other hand, sits alone, he must decide quickly, he deals largely with facts, but he must state the rule of the law so clearly and sharply that the jury can understand it, and he must see to it that his decisions and the mandates of the upper courts are carried out. In the federal courts a good deal of the everyday law—especially in admiralty—still rests on decisions of single judges. And in all branches of the work their decisions have had more effect on the law than in the state courts with which I am familiar.

What the average man expects of the courts is the justice of his country and time promptly and fairly administered. To do this is the business of the first instance courts. They deal only in a preliminary way with questions of pure law. Their most important work is in reality of an administrative character, involving problems of organization, of carrying on trials, and of putting their decisions into effect. In most cases they undertake to do three very different things: (1) to ascertain what the facts are, often from doubtful and contradictory evidence, (2) to apply the rule of law to the facts ascertained, and (3) to make their judgments effective against the person or thing concerned. Each of these functions offers ample opportunity for discussion. The problems differ widely in different courts and different states, and it is not easy nor safe to generalize too broadly about them.

One of the commonest criticisms of such courts is

their delay in getting at cases and in closing them up after trial,—and delay implies expense both direct and indirect. The delays of the law are an old subject. They form a topic by themselves; and I am not going to weary you by discussing it. There are two things, however, which I wish to say: first, I am tired of hearing lawyers talk as if delay was always the fault of the court. In our part of the country the onus of it is oftener on counsel than on judges, and I notice that Judge Owens said the same thing last year about Wisconsin. We have a practice of not holding a party to trial if his counsel is engaged in another court of equal jurisdiction. It is a courtesy of the Bar which in my state every practising lawyer has extended and has received; but it is responsible for many postponements. Where it is established I do not think that any court can grapple with it effectively without the co-operation and support of the Bar. We are working along this line in the Massachusetts District. Last year, after conference with representatives of the Boston Bar Association, and with their approval, a rule was passed in our court requiring parties to have counsel ready at all reasonable times to proceed on referred cases. I hope that the Bar will finally accede to the position that a case in court should be tried as soon as it is reached, and that if the lawyer who was retained prefers to go on elsewhere, he must send in other counsel to take his place. This is, of course, the English practice; and the new equity rules give support to the view that the United States Supreme Court would, to say the least, not disapprove it.

Delays after trial are generally due to appeals. The common-law practice in this particular is radically wrong. Take an action tried before a jury which

results in a verdict for the plaintiff. Up to this point the plaintiff, who is demanding his money, has had the initiative and could drive the case ahead. He has now lost the power to do so. It is the defendant's move. It devolves upon him to prepare the bill of exceptions, to get it assented to and allowed, or allowed over objections, and then to have the case properly entered in the appellate court. His every interest is for delay. His counsel have other cases in which the interest of their clients lies in expedition. They naturally attend to those first. Stenographers are unable to furnish transcripts promptly. The courtesy of the Bar leads the counsel for the plaintiff not to crowd his brother on the other side too hard. There are plenty of excuses and reasons for postponement which can be laid hold of for the defendant. The result is that months and sometimes years go by in important cases before the bill of exceptions is allowed, and after that months often elapse before the case is argued in the upper court. In this matter again the fault lies more with our system and with the customs of the Bar than with the courts; and the remedy seems not difficult, and lies primarily with the Bar. It seems to me neither practicable nor advisable for judges to undertake to coerce the Bar. We all know that when opposing counsel unite against the court it is pretty helpless. In Wisconsin, as Judge Owens told you last year, while the average length of a lawsuit up to final judgment in the Supreme Court of his state was twenty-three months, 17 per cent of the cases were disposed of within twelve months of the service of the summons, and two within five months. He also said that "the public mind is in a receptive mood for reform in judicial procedure," which is exactly my own feeling. The thing that is

needed is active support from the Bar. Some courts are simply swamped by the business which comes in. Delays of that sort are, of course, beyond the power of the judges and the Bar to control. Relief must be obtained in other quarters.

It would help the United States district courts greatly if Congress would authorize the designation of trial commissioners having power to try persons accused of minor offenses—of course, with the right to a jury trial if demanded, and preferably with the right of either party to appeal on a question of sentence alone, in order to bring about uniformity in the disposition of cases throughout the district. I drafted such an act during the war at the suggestion of Secretary Baker, who, I was told, approved it and would have suggested the passage of it as war legislation. But the war ended about that time. Some doubt has been expressed as to the constitutionality of such an act, upon the ground that federal judges must be appointed by the President and hold office for life. The objection does not seem very sound. Territorial judges were always appointed for terms of years; United States commissioners have long had power to give judgment in a restricted class of cases; and referees in bankruptcy are, for certain purposes, the Court of Bankruptcy, as the Supreme Court has decided. Such a law would be a great step ahead in dealing with cases under the Volstead Act, for instance, and with other minor crimes. Even in a small state like Massachusetts, it is a good deal of hardship upon a man accused of having shot a plover out of season to have to travel one hundred miles to the place where the court is held and a fine of five or ten dollars imposed. I remember one case in which a man had to

go sixty or eighty miles to the federal court because he had fired at a migratory bird without hitting it. But that case and others which I could cite are more pertinent to a discussion of the evils of a remote and bureaucratic control of criminal prosecutions than to the present subject.

While I am on the subject of desirable changes in federal practice there are some other suggestions which I should like to make.

It would be advantageous if district courts had the power, which nearly all state trial courts now have, of certifying—"reporting" it is called in Massachusetts—basic questions of law to the proper appellate tribunal in advance of trial on the merits.

The case against Senator Newberry illustrates the defect of the present federal practice. The indictment against him was bad on its face; the objection was promptly taken by demurrer, was always insisted upon, and was eventually sustained by the Supreme Court. No record was necessary in order to present that question but the indictment and the demurrer. The district judge erroneously overruled the demurrer; and there was no way in which that simple basic question could be presented to an appellate court until after a full trial and verdict. The trial lasted several weeks, as I remember it, and must have cost both the defendant and the government many thousand dollars, which was absolutely unnecessary. There are many similar cases, and they are a reproach to our practice.

There is another matter on which I speak with diffidence because my view is opposed to that of many judges and lawyers of the greatest eminence, and indeed of the Association itself. I refer to the sugges-

tion that the Conformity Act be repealed and the Supreme Court be empowered to establish uniform rules for practice at common law in the federal courts. I am confident that to do so will prove a great mistake. Every district judge in the first circuit whom I have heard express himself is of the same opinion.

The practice in actions at law differs basically in different states. Some have common-law pleading; some have common-law pleading modified by a practice act; some have codes; Louisiana has the civil law. What is to be the principle of our universal code? Is the practice of Louisiana to be accommodated to that of Massachusetts, or Massachusetts to Louisiana? Are the practice-act states to be brought under a code, or the code states under a practice act? Or both under common-law pleading? These questions have never been answered so far as I have seen, at least in any way which can be accepted as satisfactory. Remedial processes, both mesne and final, are so interwoven with the practice in the different states that it will be hard to dissect them out. How are uniform rules of practice to be adjusted to these differences? Or is the new code to cover the entire field? If so, it will be some code. Some of the state codes were drawn by lawyers of great ability and much practical experience. But the history of them all is that they have required a generation or more of time and volumes of decisions to define them. Is there any reason to believe that a new federal code would be more successful? In view of the extraordinary difficulties surrounding it, is there not every reason to apprehend that it would be far less successful? Only intolerable evils in the present practice would justify—as it seems to me—such an experiment. There are no such evils in our circuit,

and questions of practice, even including those created by the new equity rules, are no greater proportionately than in the Massachusetts courts.

The Conformity Act was a great statute; great in the breadth, simplicity, and adequacy of it. It is answering its purpose admirably. The considerations now urged for a uniform code were equally applicable when it was adopted. They must have been considered and regarded as outweighed. It has worked well for nearly a century and it ought not to be abandoned for a new plan unless the difficulties involved in such a change are squarely faced, clearly provided against, and compensating advantage demonstrated.

Law is a purely intellectual conception. Justice is not. It always implies action. The figure of justice carries a sword, presumably for use. She symbolizes law in action. Effective administration of justice is effective action along proper lines. As a people we are apt to overlook this and to feel that justice is done, or an evil corrected, if a proper statute is passed, or a proper rule of decision laid down by an authoritative court, and to forget that they are not self-executing. All the magnificent sentences about the law are mere words, all its learning and wisdom are mere abstractions, except as they are made real through first instance courts.

We put upon the first instance courts the duty of administering justice. Then we restrict their powers and hinder their effective action. And then we complain that the law is not respected nor properly enforced. If we really want a red-blooded administration of justice that decides what a man's due is and then sees that he gets it—and I think our people do want it—we must set up strong first instance courts,

give their judges the necessary powers, and make up our minds to stand their blunders because outweighed by the general good result. As Mr. Hughes said in his address to the New York Bar Association in 1916, "There can be no respect for the law without competent administration, and there can be no competent administration without adequate power . . . the difficulties in the way of needed improvements in the administration of justice will not be overcome by tying the hands of those most competent to deal with them."

I have no doubt that the average man is ready to do this. I am not so sure about the Bar. A great many lawyers resent any interference by a judge in a trial and feel that if they can win from the opposing counsel, they ought to be permitted to do so no matter how unjust the result. This view that a jury trial is a game between the lawyers, in which the presiding judge is no more than a referee, prevails—naturally it is not avowed—in many states. I have heard lawyers say that the theory of strong courts was right, but that many of our judges are not able enough nor safe enough to be entrusted with such powers. They are, however, the men to whom we have committed the administration of justice. They doubtless differ much in ability, but there are few among them who are not earnest and fair-minded in their work. Is it really sound to regard the great amount of good which they could accomplish if given more power as outweighed by comparatively few cases in which they would go wrong?

The federal courts are as yet more fortunate than many state courts in this respect, but it is doubtful how long they will continue to be so. An act passed the Senate at the last session taking from federal

judges the power to comment on facts in jury trials, and adopting the "game" theory of such proceedings. I can think of nothing that will more seriously impair their effectiveness. This matter of charging on the facts, as it is called, is not rightly understood. No judge wishes to charge on the facts or to take responsibility which he can fairly avoid. No judge ever does so on the real merits of the case except to prevent unendurable miscarriage of justice. In a dozen years I do not suppose that I have half a dozen times expressed to a jury my opinion of what their verdict should be. On the other hand I make very few charges which do not contain some statement that would be obnoxious to the proposed rule, because what I try to do is to clear away the brush and show the jury the real questions on which their decision is to turn, leaving those questions to them with no intimation of my opinion. When I find it necessary to express an opinion, I do so straightforwardly, accompanied by a strong caution to the jury that they are at liberty to disregard it if it is not in accord with their own views. Such a practice, I submit, makes for justice. How we are to deal with the complicated commercial cases, that so often are tried in the district courts, under the restriction of the proposed statute, I do not see. The basic evil of the proposed change is that the presiding judge is reduced to a condition of helplessness; that he cannot effectively interfere against chicanery and misleading of the jury. As long as he has the power to do so, he must be reckoned with by counsel, and that fact puts the trial on a much higher plane.

This is not mere fancy. I tried many cases in the state courts where the judge could not comment on facts, and many in the federal courts where he could;

and I know that if justice is what is desired, there is no comparison between these two methods. We all know that the great safeguard of the weak and the poor is a strong judiciary. The rich and the clever can be depended upon to look after themselves and to employ counsel who can win the game. Their less fortunate brethren must rely on the judge to protect their rights, and they are the ones who suffer if he is rendered impotent. I remember hearing this view very strongly put by Mr. Mansfield, counsel in my state for the American Federation of Labor; and I believe that our citizens as a whole want a strong judiciary.

An administrative organization functions by doing things. The head of a business decides and puts his decision into effect. Administrative boards, public and private, make their decisions effective promptly and without further formality. It is general recognition of the value of these qualities which has caused the rapid increase in such boards, and in private arbitrations. There is no inherent reason why law courts should be less effective in this respect than commissions. They are not so at present because, for one reason, after they have decided a case, the action which should follow the decision is, or can be, stayed by appeal. The man who is trying to collect a bill and has obtained a verdict finds that he must wait a year longer and put up a lot more money to protect his verdict against an appeal. So he prefers arbitration and criticizes the courts. The same thing is true, of course, in cases heard without a jury.

A good deal of the disrespect for law in this country is due to the fact that judgments of the first instance courts, where people see the law enforced, are not swiftly and certainly carried out. When an English

judge sentences a prisoner to death, the public look on it as the end of the case; here they regard it as the beginning of an appeal. This is, I am confident, one of the reasons why we have so much crime. The basic purpose of criminal justice is to associate in the public mind the punishment with the crime. That association of ideas is a most valuable deterrent. Delay in punishment largely destroys it. One of my friends recently said to me that punishment of crime was public vengeance upon the guilty person; that it should move, in an orderly and legal manner certainly, but swiftly and red-bloodedly; that it was not desirable for public prosecutions to be too cold-blooded and balancing performances; that they were effective as they reflected well-considered public indignation and demand for punishment. There is a great deal of truth in this. It may or may not be right to execute a murderer swiftly after the crime. To wait three years, and then put him to death is, I submit, merely to pile one murder upon another. I remember somewhere to have read a statement by an English judge opposing the allowance of appeals in capital cases upon the ground that to do so would so delay the time between the conviction and the execution as to deprive the latter of deterrent effect. He thought it better to risk the chance of important error by the trial judge than, by interposing delay, to take life without any adequate return to the public. When Sir Henry Vane claimed exceptions upon his conviction of treason the court denied them, saying "That if it be held in criminal cases for life every felon in Newgate might plead the same and so there would be no gaol-delivery." Harg. State Trials, vol. 2, p. 451. Doubtless most of you know that until within twenty years no appeal was

allowed upon even a capital conviction in England; and that now the appeals, when taken, are heard in a summary manner and disposed of before the usual day of execution. I am aware that in many states sentence, except in capital cases, is not stayed by exceptions or appeal. But there are grave practical objections to putting a sentence into execution with an appeal pending.

It would be no revolutionary change if our appellate tribunals were put into the position of supervisory courts whose business it is to see that justice is fairly and properly administered in the trial courts, and who stand ready with the broadest powers to interfere and re-examine any proceedings in which it seems to them that injustice was likely to have been done. As part of that change, appeals as a matter of right should be abolished and the judgment of the first instance court be made final and immediately effective unless stayed by an upper court. As many of you will recognize, the practice which I suggest now prevails in substance in the relations between the United States Supreme Court and the various courts of appeal. It is working very well; indeed, a proposal to put most of the appellate jurisdictions of the Supreme Court on that basis is now before Congress and is favored by the justices of that Court.* Such a change would do much to strengthen the first instance courts, and the limitation of appealed cases to those which really ought to go up would relieve the over-burdened appellate courts.

The present condition is a natural outgrowth of the legalistic movement of the nineteenth century, which emphasized the importance of rules and overlooked the administrative weakness and difficulties which were

* It has since been passed.

bound to follow. There are indications that the force of this movement is subsiding, and that in the years ahead questions of legal administration will receive more adequate attention. Many of the recent addresses before this Association illustrate this. The present Chief Justice is doing great work in such matters. He has established the Judicial Council, which has promise of great usefulness, and he has taken steps to concentrate federal judges where the work is heaviest, and he follows the work of the trial courts and stands ready to assist them.

If we can trust commissions and boards, which are often not composed of lawyers, to deal finally with most important matters affecting not merely a few parties, but oftentimes the entire public, is there serious danger in strengthening the hands of the trial courts? Even to the point where their decisions should carry the same weight as those, *e.g.*, of immigration inspectors in matters involving personal liberty, or tax departments in matters involving enormous amounts of money? In other words, would it not be better to say that if there has been an honest decision arrived at by fair methods which do not violate any fundamental principle of law, the result should stand? Such a practice would leave greater room for divergence of ruling in the trial courts than now exists. But I doubt if the inconsistencies would be as great as now exist between different judges in dealing with similar evidence or facts, and, of course, we already have inconsistency of rule between adjoining states. Have we not made a fetish of legal uniformity? Are we not paying too high a price for it? We all know how juries differ in their verdicts on similar evidence. It does not shock us; we accept it as a "rub of the green,"

one of the chances of life. But life and liberty, honor and property, stand or fall by it. Would it not be wise to accept divergencies on law in the same way?

The soundness of these suggestions depends on the view which one takes of the development of the law. To me it seems impossible that the law shall progress through ever-increasing refinement of rules administered with meticulous exactness, as is our present theory, or that a law so developed will not eventually become an incubus and a fetter upon the activity of the community and upon the administration of justice. I share the feeling which Dean Pound of the Harvard Law School has expressed, that the administration of justice should consist rather in an application of general principles established by statute and by the appellate courts than in the correct application of minute rules of conduct and property. Is the law a means or an end? If our vision is of something deeper and higher than any law, that curious conception which we call "justice," and which can hardly more be defined than "conscience," towards which we struggle and which we try to achieve, the suggestions will be found sound. If, on the other hand, one feels that in human affairs the law is the end, that it is as far as we can go toward ultimate justice, then he would, of course, disagree. I venture to think that what we need in this country is a little more of the continental attitude toward law. It is there regarded as the handmaiden of business and of the government, the object being to preserve peace and security within the country and to settle private disagreements in an efficient way. That absolute harmony of legal principle between decisions, for which we make such tremendous sacrifices of efficiency and speed in our courts, is re-

garded as less important than promptness and vigor in administration.

Courts are at best necessary evils, maintained to suppress the greater evils of violence and wrong. Nobody wishes to come into them either as plaintiff or defendant. They leave a trail of disappointment and pain. They justify themselves only if they leave also the abiding conviction that they have, as I said at the beginning, administered the justice of their country and time fairly and well.

NOTE TO JUDGE MORTON'S ADDRESS

In view of the enormous increase of work for the federal courts, particularly on the criminal side as a result of all kinds of regulations of congress and especially the liquor law, Judge Morton's suggestion of the need of additional tribunals with jurisdiction similar to our state district courts in place of the limited powers of United States commissioners deserves attention. The district courts of the United States were never intended to do the work of police courts in addition to all their other work, which covers a broader field of jurisdiction than any other courts of first instance in the country. In view of the enormous amount of police-court criminal business which has been dumped into the federal courts in recent years as a result of acts of congress regulating individual conduct in every direction, the courts simply do not function in regard to much of it.

In the press last March it appeared that, because of congestion of cases, Judge Morton instructed a federal grand jury in Boston as follows:

> "With reference to cases under the liquor law, I think it proper to call your attention to the opinion expressed by the Judicial Council, consisting of the Chief Justice of the United States and the nine senior circuit judges, that trivial and local violations of the act were properly prosecuted in State courts and that the Federal Government should devote its activities to the suppression

of the manufacture, transportation on a large scale and smuggling.

"This opinion obviously carries weight and you should carefully consider it in dealing with this class of cases. The idea is that a common nuisance or a sale of liquor in a near-beer saloon or restaurant and violations of the local sort should be prosecuted in the State courts; while smuggling, manufacturing and transportation on a large scale are properly prosecuted here."

Recently Judge Morton was again quoted as follows:

"Judge Morton, in the U.S. district court here yesterday, took federal officials to task for bringing unimportant liquor cases before him. He disposed of them by fining the defendants $1 each, after making this statement: 'I object to these small cases being brought into the federal court. I have spoken against it again and again. They are matters that should be disposed of in the state courts and I will dispose of now on that basis. I impose fines and leave the cases to be further prosecuted in the local courts.'"

This is all very well for the federal court, but what is going to happen to the state courts if congress continues to pass regulations without creating tribunals to enforce them? The problems of congestion were acute in some of the state courts before, and if both the state legislatures and congress continue to create more work without studying the pressing problems of how it is to be done in 1925 and thereafter under arrangements adapted to the business of 1875, the work simply will not get done. Merely adding a judge or two will not cure the situation if what is needed is some "clearing-house" plan.

Turning to New York, the "New York Times" of July 27-30, 1925, gave us the following news:

"United States Attorney Emory R. Buckner will open his second drive on the overcrowded liquor calendar before Judge Edwin L. Garvin in the Federal Court today. This campaign, he said, would be in the nature of a bargain sale and those of the 2,000 petty offenders who pleaded guilty would be fined and those who stood trial and were convicted would be recommended for a

jail term. He said he expected to clear up the 2,000 cases in the coming week, after which he would take up the fifty padlocking cases which were ready for presentation. . . .

" 'I have told Judge Garvin that I think it is in the public interest and in the interest of prohibition enforcement to clean up these 2,000 small cases on the basis of a July clearance bargain sale,' he said. 'I have recommended, and I hope he will approve, the imposition of fines running from $50 to $100 upon all who plead guilty, and jail sentences upon all who stand trial and are convicted.

" 'We want to clear ourselves of all stock of this character and we hope to open in the Fall with an entirely new line of prohibition goods. We shall discontinue the five and ten-cent counter in accordance with the policy which has been in effect since I took office, so far as new cases are concerned, and we will deal only, generally speaking, in the padlock for the retailer and jail sentences for the bootlegger, the wholesaler, the importer, the manufacturer, and the financial backer. . . .

" 'The thousands of petty arrests which have been made in this district during the past few years have so swamped Federal machinery as to render it impossible to wage a concentrated and sustained war against the rum-runners and bootleggers and manufacturers. The Federal officials have been trying to run a marathon on tanglefoot flypaper. The piling up of thousands of arrests and the collection of hundreds of thousand of dollars' worth of fines, calling them "convictions," make a very impressive "record," but from the standpoint of law enforcement are nothing but a farce.

" 'This farce has been aggravated by the absolute necessity of dealing with these petty offenses only on a fine basis, as there has not been any remote possibility of trials before juries and jail sentences for the smallest fraction of them. It is a little short of compounding with crime for the Government to take this dirty money and call it rigid enforcement of the prohibition law. . . .

" 'When Judge Garvin cleans up the 2,000 petty liquor cases to be brought before him this week there will be no more cases of that type, generally speaking, so long as I am in office. I am not picking and choosing prosecutions according to whim or caprice, or attempting to repeal the law in part and enforce it in part. I am simply

picking and choosing prosecutions in accordance with the number of Judges, the number of assistants and the number of clerks which are provided by the Federal Government, and my oath of office not only justifies but actually compels me to employ this limited machinery in the manner which will peg out the greatest advance in the enforcement of the prohibition law, while at the same time enabling me to enforce other laws with equal regard.

" 'I cannot, in justice to the rest of my job, devote more than 25 per cent. of my equipment to the enforcement of the prohibition law, and I want to make this 25 per cent. produce the greatest results which it is capable of producing rather than merely to keep it conspicuously busy milling around with a mob of petty violators of the Volstead act.' "

"Criticisms leveled at United States Attorney Buckner because of his method of disposing of petty offenders against the prohibition laws drew a statement from Mr. Buckner yesterday in which he said that in a drive last month 1,125 cases were disposed of on the same basis as the cases now coming before the bargain day court, and continued:

" 'The propriety of my action cannot be criticized because with the number of Federal Judges available and the number of Assistant United States District Attorneys available I have nothing but a Hobson's choice. If I were to take the position that these petty offenders must go to jail, they would all demand jury trials and it would take me ten years to dispose of the present calendar on a jury trial basis. In other words, if we should right now ring down the asbestos curtain against all new cases and refuse to accept any new prohibition cases of any kind whatsoever, we would be about ten years disposing of our present calendar on a jury basis. With this condition confronting us, the propriety of my action cannot be questioned because there is no alternative.

" 'My only other course would be to let the cases accumulate dust from year to year and quietly dismiss them under the chloroform of secrecy from time to time, so that no one would know anything about it. I believe the frank disclosure of the facts, clearing out the small cases on a fine basis and thus justifying my embargo against petty cases in the future is in the interest of more efficient law enforcement. It is in the public interest to state frankly what I can do and cannot do and what I

> will do and won't do if that policy is supported by conditions which exist in this district and have existed for many years.' "

The "Times" of July 31 stated that "The total estimated results of the four days were 1,297 pleas of guilty; $79,729. collected in fines; and on paper $203,250. in bail forfeitures." Some of these forfeitures were doubtless remitted if failure to appear was the result of accident.

Mr. Buckner's reasons seem convincing. They are stated in language which is easily understood by the newspaper-reading public. But they are not likely to encourage respect for the criminal law, and they furnish striking evidence of the mistaken American policy of creating artificial "crimes" by law of such a character and on such a scale as to obstruct the enforcement of all other laws. Mr. Child's articles in the "Saturday Evening Post," beginning August 1, 1925, on what he calls the "crime tide," entitled "The Great American Scandal," and the article in the "Atlantic Monthly" for July, 1925, entitled "Selling It," may well be read in this connection.

Judge Morton's suggestion of a system of federal police courts, in which defendants should claim or waive a jury trial, is in line with the recommendation of the Massachusetts Judicature Commission for a similar experiment in the Boston Municipal Court. It would avoid the effect of the decision of the Supreme Court of the United States in *Callan* v. *Wilson* in 1887 (127 U.S. 540) that the federal constitution prevented the establishment of a police court in the District of Columbia like our state district courts, in which the right to jury trial was protected by a reasonable opportunity to appeal to a jury court. The court in that case decided as follows:

> "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in what-

> ever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

In the course of the opinion the court said:

> "If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial, and to put him, if convicted, to an appeal to another court, to secure a trial by jury, it is difficult to see why it may not also have the power to provide for several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury. In my judgment, the accused is entitled, not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury."

This sentence sounds well, but what is the practical result for defendants in general? They are now subject to an extended public hearing before a United States Commissioner on the question whether there is "probable cause" on which he should hold them for the federal grand jury. This hearing may be quite fully mentioned in the newspapers. If the Commissioner holds him, the time and attention of twenty-three citizens of the grand jury is devoted to considering over again whether there is sufficient cause to hold him for trial. If they hold him, the situation then arises which is pictured above in the account of Mr. Buckner's "Bargain Days" and the variety of similar situations which doubtless exist in other thickly populated federal districts.

After reflecting on this process involved in dealing even with minor offenses which do not come within the adjective "petty," it seems a little like using a sledge-hammer to deal with a mosquito. When it is realized that it all results from the theoretical reasoning of the federal courts about the right to trial by jury, one wonders whether there is not a flaw somewhere in the reasoning in cases like *Callan* v. *Wilson* and the majority opinion of the Circuit Court of Appeals in *Dickinson*

v. *United States*, 159 Fed. 801, and *Freeman* v. *United States*, 227 Fed. 732 (*cf.* "Mass. Law Quart." for May, 1924, pp. 53-61).

The whole situation reminds us of a story told by Chief Justice Olsen of the Municipal Court of Chicago of an incident that occurred when he was in charge, as prosecuting attorney, of a grand jury presided over by James R. Forgan, then president of the First National Bank:

> "The burglary of a home was being investigated, and the housewife waved a greasy corset, the stolen property, which was evidence in the case. Mr. Forgan felt pride in doing his patriotic duty as a grand juror, but his good sense caused him to turn to me and say: 'Can't you lawyers devise some simpler and less expensive way to investigate such matters than to take twenty-three business men away from their affairs to do it?'" (See Am. Jud. Soc. Journal for Dec. 1922, p. 109.)

The amount of judicial machinery now involved in dealing with many offenses as a result of the theoretical view of the right to jury trial results practically in providing the offenders in the community with the opportunity, which they want, to dictate what shall or shall not be done with them. This was not the purpose of the right to jury trial. That purpose was to protect individuals against arbitrary power.

The opening sentence of Article III of the Federal Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the congress may from time to time ordain and establish." This is the controlling grant of jurisdiction. To weaken it by interpreting the subsequent clause, "The trial of all crimes, except in cases of impeachment, shall be by jury," into a mandatory jurisdictional requirement which, if carried further, might prevent the American public from adapting its system to deal promptly and effectively with its criminal element and leave the nation helpless, seems very shortsighted and reminds us again of the need of remembering Marshall's much quoted phrase that "It is a constitution that we are construing." This matter of waiving a jury is further discussed in the next article.

Another reason which has been given for the practice of the federal court in sending small liquor cases to the state courts is that Massachusetts "now has its own Volstead act which makes criminal pretty much the same things as the national prohibition act. The same act can be prosecuted in either jurisdiction; so why should it not be left to the jurisdiction to which it really belongs according to the basic principles of our government?" In commenting on this suggestion a well-known member of the bar says:

> "The action of Massachusetts in passing the 'Baby Volstead Act' was not to help out the United States courts, but to create an entirely new and separate crime against the state sovereignty out of the same facts which constitute a crime against the federal sovereignty. Under those circumstances it is encumbent upon the federal sovereignty to take care of its own crimes and it is illogical to say that the federal court will not take care of United States crime because the crime against the state sovereignty can be punished in the state courts. This is a real distinction. There is no reason why the United States should decline to enforce its own laws against violations merely because the culprit has violated some state law. Even if this were not so there is no reason why the United States should compel the states to be put to the expense and trouble of enforcing the United States laws by declining jurisdiction."

Hon. Charles Warren, in his article on "Federal Criminal Laws in the State Courts" ("Harvard Law Review," March 1925, at p. 546), suggests that, "While congress has no power to force jurisdiction upon a state court, it has the power to leave jurisdiction to a state court." Even if this is so, congress has not yet left jurisdiction to the state courts.

The whole situation might be said to furnish an illustration of the short-sightedness of Massachusetts in adopting the "Baby Volstead" act, so called, but on this point men will doubtless disagree. At all events, it emphasizes the problem which arises for the various states of having two masters, in the form of state legislature and congress, both giving orders as to what shall be done at the same time to an increasing degree and in the same field of activity as the result of the

constant encroachments by congress on the function of the states as originally conceived relative to police power, taxation, and other things, all of which feed each other.

President Coolidge's warnings to congress as to the danger of weakening the principle of local self-government need to be remembered, and it is perhaps not out of place here to recall the words of a New England Antifederalist, Thomas B. Wait, of Portland, Maine, then part of Massachusetts. In supporting the movement for a bill of rights in the Federal Constitution, he wrote to George Thatcher:

> "I consider the several States . . . to stand in a similar relation to the Nation, and its Constitution—as do individuals to a State and its Constitution—the former have certain rights, as well as the latter that ought to be secured to them—otherwise . . . the whole will be 'melted down' into one nation; and then God have mercy on us . . . The vast Continent of America can not be long subjected to a Democracy, if consolidated into one Government—you might as well attempt to rule Hell by Prayer" ("The Federal Constitution in Massachusetts" —Harding, p. 38).

Judge Morton's clear statement in regard to the bill before congress to "muzzle" the federal judges in jury trials, on page 10, deserves special attention. The Committee of the American Bar Association on Jurisprudence and Law Reform, which has been opposing this bill for years, has suggested a doubt as to its constitutionality, in its report printed on pages 95-99 in the pamphlet containing the programme of the meeting of the association in 1925. For a more detailed argument against the constitutionality of the proposed act of congress see "Massachusetts Law Quarterly" for August, 1918, pp. 347-357.

MORE ABOUT ELECTION BETWEEN JURY TRIAL AND TRIAL WITHOUT JURY BY DEFENDANTS IN CRIMINAL CASES.

The following news from Connecticut which appeared in the *Bar Bulletin* for April, 1925, has again attracted the attention of the courts and the legislature to this subject as one for practical consideration, and not merely of theoretical interest.

> "*Election of Trial by Court or Jury in Criminal Cases in Connecticut.*
>
> In the Chapman murder case in Connecticut, before the trial, the defendant was brought into court and given the opportunity to choose whether he would be tried by the court or by a jury. Upon inquiry we learn from the office of the Clerk of Court at Hartford, that
>
> 'Chapter 267, section 2 of the Public Acts of Connecticut, 1921, provides that "the accused may, if he shall so elect when called upon to plead, be tried by the Court instead of by the jury." You will see that the accused, or his attorney, of course, should make the election to be tried by the Court, if it is so desired, at the time of the plea. If no election is volunteered at that time the Clerk or the Court usually inquires if the accused desires to be tried by the Court or by the jury. If he elects to be tried by the Court notation to that effect is made on the docket and the information. If he does not elect the court no record is necessary because then he is tried in the usual manner before the jury.
>
> 'Since this law went into effect some four years ago, there have been, roughly, about 70 per cent. of the cases tried by the Court and about 30 per cent. by the jury.' "

In May, the Superior Court began the experiment in Suffolk County of trying appealed misdemeanor cases without jury at the request of the defendant; and, by Resolve Chapter 27, the legislature requested the Judicial Council to investigate the Maryland and Connecticut practice.

In the recent "Pickwick Club" indictment cases some of the defendants requested a trial by the court, but the court ruled that it was not bound to try them without jury and directed trial by jury.

At the end of an extended study of the history of this matter in Massachusetts in this magazine for August, 1923, pages 7-50, the following tentative conclusions were expressed:

"Unless some controlling authorities or considerations have escaped the attention of the writer, the results are:

I. That in the minor offences tried in the District Courts the right to jury trial is satisfied by giving the defendant a right to claim a jury by appeal;

II. That in the cases of indictment in the Superior Court the defendant will be tried by a jury unless he expressly requests the court to try him without a jury;

III. That under the G. L. c. 277, s. 71, it is 'not necessary in any case to ask him how he will be tried,' but

IV. If a defendant freely and with full knowledge of what he is doing asks to be tried by the court without a jury, it is the duty of the court so to try him.

V. As to the discretion of the court in the matter, such as exists in civil cases (see *Gonzonlas* v. *Stock & Sons*, 223 Mass. at 538), of course, if the court was not satisfied that the request for trial without jury was not made with full understanding and without pressure, it would be the duty of the court to disregard the request. But if the request is clear and free in the exercise of a constitutional right, the court would seem to have no discretion. In this respect the case differs from a civil case because the only right involved is the defendant's. There seems to be no right of the government in the matter."

If IV and V seem too absolute, especially as to capital cases, another view taken by some courts is that the matter is within the power of the legislature to regulate. The power of the Connecticut legislature to authorize the defendant to choose the mode of trial was fully sustained in 1878 in *State* v. *Worden*, 46 Conn. 349, and again in *State* v. *Rankin*, decided February 23, 1925.

The jurisdiction of the Municipal Court of Minneapolis to try a man for assault and battery who "expressly waived a jury" was sustained in *State* v. *Woodling*, 53 Minn. 142, and, as the opinion of Judge Mitchell discusses the constitutional question briefly and broadly, although somewhat beyond the necessities of the case, the following extract from his opinion is here reprinted.

OPINION OF MITCHELL, J., IN STATE *v.* WOODLING, 53 MINN. 142, AT 144-5.

"Mitchell, J. The defendant, having been arraigned before the municipal court of Minneapolis upon a complaint for assault and battery, pleaded not guilty, and expressly waived a jury, and thereupon the court, having tried the case, found the defendant guilty, and ordered that he pay a fine of $25.

"The defendant on appeal raises the point that the court had no jurisdiction to render judgment without the verdict of a jury.

"Without going into any general discussion of the subject, we may say that it seems to us that perhaps the true criterion is whether the right is a privilege intended merely for the benefit of the defendant, or whether it is one which also affects the public, or goes to the jurisdiction of the court. If it belongs to the first class, we see no good reason why the accused may not waive it; but, if it belongs to the latter, it would seem that no consent on his part could amount to a valid waiver. And the different views entertained as to the nature and object of constitutional provisions relating to the right of trial by jury in criminal cases will probably account for the conflict of decisions as to whether it can be waived.

"Those who construe the right as a matter in which the public has no interest, and which is not jurisdictional, but designed solely for the protection of the defendant, naturally hold that it may be waived; while those who take the view that it affects the public as well as the defendant, or that it relates to the constitution of the court, of which it is intended to make the jury an essential part, as naturally hold that it cannot be waived. If our constitution provided, as did the original constitution of the United States, (article 3, sec. 2), that 'the trial of all crimes (except in cases of impeachment) shall be by jury,' there would be good grounds for arguing that a jury was intended to be an essential part of a constitutional tribunal for the trial of crimes, without which it would not be legally constituted, any more than it would be without a judge. But our constitution contains no such provision. Its language is (article 1, sec. 6): 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' etc. This language imports merely a grant or a guaranty of a right to the accused for his own protection, and seems to us never to have been intended to prescribe the organization of the court, or to make a jury an essential part of it. If this be so, it necessarily follows that the presence or absence of a jury is not a jurisdictional matter,—that is, it does not go to the constitutional organization of the court,—and that, if the defendant cannot waive a jury trial, it must be purely upon grounds of public policy, and because the public have such an interest in the life and liberty of the citizen that he ought not to be allowed to waive this safeguard which the constitution has thrown around him. If the right is intended merely for his protection, it is difficult to see why on principle he may not waive it, or why any distinction in that regard should be made between the right to a jury trial and various other rights which it is uniformly held that he can waive. It is also difficult to perceive the distinction sometimes made in this respect between misdemeanors and felonies, unless it be founded on considerations of public policy growing out of the greater severity of punishment in case of the latter. As already suggested, if the accused cannot waive a jury, his inability to do so must rest wholly upon some supposed consideration of public policy. The constitution contains no provision forbidding him to do so, or prohibiting the legislature from permit-

ting it to be done. On many matters, what is and what is not in accordance with public policy is largely within the discretion of the legislature. In fact, public policy is largely the creation of the legislature. In the absence of any constitutional prohibition, we fail to see why a declaration of legislative views as to the policy of permitting the accused to waive a jury trial is not decisive of the matter."

In this opinion of Judge Mitchell's, as in various other opinions, the difference between the Federal Constitution and various state constitutions is relied on and it is suggested that the provision in the Federal Constitution that "The trial of all crimes (except in cases of impeachment) shall be by jury" enters into the constitutional jurisdiction of the Federal courts. In a discussion of this matter in MASSACHUSETTS LAW QUARTERLY for May, 1924 (at p. 66), it was pointed out, however, that "The judiciary article (of the Federal Constitution) does not entirely confine itself to jurisdiction. There are some sentences in it which obviously have the character of provisions in a bill of rights," such as the clause against conviction of treason unless on testimony of two witnesses or on confession in open court and the further provision against attainder. It seems arguable, therefore, that the words as to the trial of "crimes" are of similar character.

In view of the growing practical problems of the fair administration of the criminal law for the protection both of the individual and of society, it may be that the traditional view of the right to jury trial is too theoretical and needs to be reconsidered by the court in the light of modern conditions in order that it may be capable of administration in a manner more consistent in practice with its real purpose of protection to the individual accused as well as to society.

The theoretical view that the right to jury trial, while it is called a "right", is really a *requirement*, may produce practical results, as pointed out by Judge Aldrich in his dissenting opinion in *Dickinson* v. *U. S.*, 169 Fed. 801, which, instead of being a protection, would be very oppressive.

Another aspect of this view, which found rather extraordinary expression in the case of *Callan* v. *Wilson* (discussed elsewhere in the note to Judge Morton's address) blocked a reasonable attempt of congress to provide a municipal court of the usual criminal jurisdiction for the District of Columbia.

There seems to be no convincing reason why the words "The trial of all crimes shall be by jury" should be interpreted to mean

that congress can not provide that the courts shall have jurisdiction to try a man without jury if he clearly waives his right to a jury trial and chooses to go to trial without a jury.

In view of the often-quoted remarks of the present Chief Justice of the Supreme Court of the United States about the unsatisfactory condition of the administration of the criminal law in America, perhaps the Supreme Court would be disposed to reconsider very fully the question whether the theoretical view of the constitutional right to jury trial has not been carried to such a sentimental extreme in some of the opinions of the federal courts as to defeat its purpose and provide a practical obstacle to improvements in the judicial system. The few decisions, which deal with the right as a requirement under the guise of a right and which emphasize the unconvincing "fiction" that "there can be no jurisdiction by consent," should not stand in the way of a full reconsideration when the question arises.

The practical result of the interpretation of the right as an absolute requirement of a jury trial as a jurisdictional matter in the federal courts, as at present organized in a thickly populated district, is shown by the four "bargain days" recently conducted in the New York Federal Court by United States Attorney Buckner as described in the note to Judge Morton's address in this number. This method of getting rid of a jury trial and securing for the court jurisdiction to sentence "by consent", on the wholesale plan, is illuminating and seems likely sooner or later to make appellate courts take notice. It furnishes an interesting comparison with the historical development of jury trial. As James B. Thayer and others point out, the jurisdiction of the court to try by jury instead of by some other method originally came in by consent. (Thayer "Preliminary Treatise on Evidence".) The consent was then sometimes forced by the gently persuasive process of "*peine forte et dure*". Instead of this practice in the federal courts, we now have to bribe the defendants in bunches to "consent" not to be tried by jury and thus consent that the court may have jurisdiction to sentence them in order that all the other business of the court may not be stopped. Perhaps these interesting results and comparisons may have some bearing on the question what is the sound theory of the right to jury trial. F. W. G.

"THE LEGAL PRIVILEGE OF CONCEALING THE TRUTH."

Introductory Statement.

The "Boston Post" of June 11, 1925, contained an account of Mr. Whipple's address before the American Medical Society in which he charged that there was much popular misunderstanding of the courts which was due to the "technicalities" of the "rules of evidence" which he thought should be modified. This address was commented on in the July number of the "Bar Bulletin" of the Boston Bar Association and it was suggested that the bar would be interested if he would formulate definite modifications of the "Rules of Evidence" for discussion. Accordingly, at the editor's request, Mr. Whipple submitted a copy of his address before the Maryland State Bar Association in 1922 which is here reprinted in order to stimulate discussion and focus attention on the questions which, as suggested in the "Bar Bulletin", form a sort of challenge to the legal profession and to the community either to justify or to improve the rules which he criticizes.

At the end of Mr. Whipple's address, which is here reprinted, the editor has added a note commenting on some of his suggestions in detail. In these introductory sentences, therefore, only one general comment is suggested, to be borne in mind in reading the address. This comment refers to the title. Between what he calls, "The Legal Privilege of Concealing the Truth", and what might be called, "The Legal, or at Least Practical, Privilege of Distorting and Misusing Truth", which is one of the reasons for some of the existing rules, the practical object in the study of procedure and administrative methods is to find out fair ways, not only of ascertaining, but of *protecting*, the truth. This is suggested to get the whole subject in better perspective. Of course absolute perfection in the application of abstract justice, even if we had a photographic picture and a phonographic record of everything that was said and done by everybody, everywhere could hardly be expected of fallible human beings. Our problem is to adjust the rules gradually to the fairest method of ascertaining and protecting the facts and applying the law that we are capable of administering.

Mr. Whipple's address was as follows:

F. W. G.

Address by SHERMAN L. WHIPPLE

Before the Maryland State Bar Association, July 1, 1922.

The proposition that under the law there exists a right or privilege on the part of anyone to withhold or suppress evidence of material facts in the trial of causes, is one which, in its general statement, is likely to cause surprise, and even doubt. Such a proposition seems to be inconsistent with every axiom or principle that underlies the administration of justice. For how can justice be done, we exclaim, except the judgments of the court rest upon truth, and truth alone? How otherwise can such judgments be righteous? Why is every witness called upon solemnly to swear that he will tell "the truth, the whole truth, and nothing but the truth," if, indeed, it be a fact that, after all, the law permits him merely to tell a part of the truth, and justifies him in withholding the rest of it? How can it be said that the trial of a cause is but "the search for truth," when in some respects, at least, the search must be a vain one?

I apprehend that no one of us would undertake to challenge the correctness of the principle which underlies these queries. We all agree, I am sure, that our courts can deliver righteous judgments only if they know the truth, the whole truth, and nothing but the truth. But the fact remains that within our system of administering justice as it now exists, there are things which the law places above the ascertainment of truth—things which it is said justify the concealment or the withholding of the truth, in a measurable degree, at least,—in the trial of causes.

To be accurate, then, must we not modify what we have considered as axiomatic principles, so they will read somewhat in this way? Justice generally, indeed, rests upon truth; but in some cases, and to some extent, justice must rest on something else. Must we not say,—it is, indeed, true that the trial of a cause is "a search for the truth," but it is equally true that there are certain places to which the search must not be extended and which the law denies the searcher the right to penetrate. Not that the truth is not there, not that the truth is not accessible and ascertainable, but the right to know it is denied, because under the law as it now stands, certain things are held more highly than the disclosure of truth.

It is my purpose, with your permission, to refer to and briefly discuss some of these concealments which the law now justifies, to the end that we may learn whether the foundations of legal justification are really under them; whether our system of procedure would not be better if these legal privileges of concealing or withholding the truth were done away with; whether, indeed, the principle that in the halls of justice nothing whatever shall stand in the way of a full and complete disclosure of the truth, is not a principle more consonant with modern standards of the administration of justice than those to which we have just referred.

May I pause a moment to suggest that the subject is not without interest or importance at this time, both to the profession and to the public. We, as lawyers, cannot be unaware of the popular criticism to which both lawyers and courts have been subjected in recent years; and we are agreed, I think, that the views of the people at large as to our legal procedure ought not to be lightly regarded. We may not believe in them, but if these views and the criticisms which they reflect are unfounded, we, with our superior knowledge of the subject, ought to be able easily to refute the critics.

On the other hand, they may not be unfounded. It may be that the point of view of laymen, the angle from which they see these things, unaffected as it is by the associations and prejudices of tradition, will reveal things that we of the profession miss, from the very fact of our nearness to the things criticized, and because our daily experience and familiarity with the subjects may dull our sense of relation and proportion.

Furthermore, our supreme effort should always be, should it not, so to conduct the administration of justice as to commend it to popular approval and confidence? Not only must we make the judgment of our courts accurate, righteous, certain and complete, but we must so do it as to make the people believe in the courts and have confidence in what they do.

We can scarcely ignore the open and notorious fact that business men,— men of large affairs — dread to enter the courts. They prefer to make enormous sacrifices rather than to do it,— so, as they are wont to say, "to keep the lawyers out of it." They express a want of confidence in getting justice if they do resort to the courts, and so they adopt all sorts of methods of arbitration or settlement. The public are provoked and irritated

at the law's delay,— the waste of their time in attendance upon the courts. They are disgusted with the disputatious bickerings and finical objections of lawyers, with the exclusion of evidential facts which seem to them important and persuasive, and with the application of rules in the conduct of causes, which seem to them to lack the basis of common sense. They often feel that as witnesses they are treated with unnecessary discourtesy, and that they are not permitted to tell the truth as they know it.

Many of the methods in vogue among lawyers in the conduct of a trial do not meet with popular approval. In the popular mind their course is often shrewd and rather over-smart, in technical matters,— perhaps even tricky,— rather than that of a frank, candid, and sincere man; and it would seem to be the estimate of the average citizen that lawyers strive for partisan results often without too fine a regard as to the question whether such result be just — or otherwise. There is a feeling, also, that the result of litigation is made to depend too much on the comparative abilities of the lawyers engaged, and too little upon the justice of the cause.

This ought not to be so.

The courts ought to be a place to which the general public, and especially men of affairs, can resort with the feeling that justice will be promptly, completely, and righteously administered; where direct and final results are certain, and where a just cause will prevail in spite of the subtlety of legal craft.

Our profession has no higher duty than to make them so. For how otherwise are we to restore our courts and lawyers, and our system of doing justice, to the high place in popular esteem which they once held, and to which we all believe they are fairly entitled?

The means by which the truth is concealed or withheld in the trial of causes is, of course, by the rules by which evidence is excluded. These rules controlling the introduction of evidence are, as we all know, an inheritance of the common law. Many of them have been approved or adopted in statutes or even Constitutions, but most of them exist today purely by reason of precedent and tradition.

It is to be noted, first, that these rules originated under conditions of society which do not now exist. They are adapted to deal with traits and habits of human character and ruling emotions and motives of the human mind, which may have then

existed, but which have either disappeared or become much modified and better controlled in our times.

One of the most notable of these rules is that which denied the right of the party to a cause or a person pecuniarily interested therein, to testify regarding the matter in any way. The courts by which this rule was adopted were surely sufficiently distrustful of the possibility of honesty or integrity of the individual. The conception that a man might not perjure himself to obtain a financial advantage in a lawsut or to protect himself from punishment for an offense of which he was accused, apparently did not exist. Of course under such circumstances any man would lie! How could he help it? Who would expect otherwise? The court said with deliberation, apparently, what the psalmist said in his haste,— that "All men are liars." It seems almost inconceivable that even two centuries ago the character and honesty of the average man should have been held by the court in such contempt. And yet this rule which so reflects upon decency and honor survived for centuries in English courts and in our own, and still survives in a modified form in jurisdictions which retain the rule that where one party to the litigation is dead, the other shall not be permitted to testify as to conversations upon which the entire case may rest.

The rule that one charged with crime might remain silent under the charge, and that he should not be compelled against his will either to admit or deny the charge or speak concerning it, had its origin in the same low estimate of human character. For there could be no other justification of such a rule than the belief that officials of the Government, if once they should accuse a person of crime, would pursue him to conviction whether he were actually innocent or guilty. And the rule is consistent only with a belief that in the pursuit of such purpose officers of the law would torture or threaten the person so charged, though innocent, into confession of guilt, or at least distort his admissions in order unfairly and unrighteously to bring about his conviction.

It was only after years of debate that the senseless rule that interested parties should not be allowed to testify in causes in which they were interested or parties litigant, almost completely went into the discard. But the rule at which our common sense no less revolts,— that one charged with crime may not be examined under his oath as to whether he be guilty

or innocent of the charge,—still remains. The rule has been relaxed so as to permit such a defendant to speak in his own behalf as a witness, if he so desires; but the essential absurdity of the rule survives in the privilege which the law still maintains, to remain silent and exempt from examination, and that such silence shall not weigh against him. If we assume that such a rule was justified in an age characterized by brutal cruelty, oppression, and disregard of human rights, by those who exercised the authority of government, it certainly has no longer a place in modern procedure, where it continues to exist only as a disreputable means by which criminals escape the penalty which the law attaches to their misdeeds.

Another rule which scarcely less obstructs the disclosure of truth is that which exempts a client or his attorney from testifying, if called upon in court, to the things which the client has divulged to counsel.

The history of the origin and object of this rule is interesting.

It is plain that the effect of this rule is to promote the business of the lawyers. It enables the criminal in safety to confess to his attorney his guilt and to secure his aid to escape his proper punishment. It enables the tricky and dishonest client to confide with safety his desire to repudiate and escape his honest obligations, and to get the advice of counsel how best to do it. Without such a privilege, the chief value of a lawyer would be lost to a self-confessed criminal or to a dishonest litigant. Obviously, the rule is one which brings financial profit to the practitioner from the least desirable of his clients; for to the man who consults his lawyer with honest purpose merely to seek justice, or who is innocent of crime, the privilege is of no value, for the things such men confide to their counsel would be revealed in court only to their advantage, and to show their innocence and honest purpose.

But financial gain to the practitioner is not set down in the books as the ground of this rule, or the cause of its origin. The reasons stated are not wholly consistent. In the first instance, the rule was said to be based "upon consideration for the honor and oath of the attorney, rather than for the apprehensions of his client." It was said that it would not be consistent with honor for a lawyer to reveal the confidential admissions of his client, and that by the same token it would not be consistent with honor for the court to require its attorney thus to act. It seems to

have been the view of the court that, on the whole, society would be better served if criminals, even murderers, should escape the punishment for crime than that the court should require its attorney to do a thing so inconsistent with his honor as to reveal that the criminal had confessed his guilt. This remained in the opinion of the court the ground for the privilege for something like two centuries.

But of course such ground proved rather shaky and hard to defend. What of the confidence criminals might repose in a brother or sister, or son or parent, or even a friend? Was it less a "point of honor" that one of these should not betray a confidence? What reason could be advanced why a court should compel a person in such relation of affection and confidence to do a thing so inconsistent with honor, and excuse the lawyer?

So it came about a century or so ago that the foundations of this privilege were shaken by clearer notions of real honor then prevailing; and with them nearly went the privilege itself. It, however, was rescued, apparently by the genius of those who profited by it and set up on the new foundation on which it now rests — the public policy that the client in consulting his legal adviser ought to be free from apprehension of disclosure of his confidence.

So it happens that in the enlightened civilization of the twentieth century, the rule obtains that no criminal or dishonest client need to have fear in confiding either his guilt or his vicious and unworthy secrets to counsel, it being the theory of the rule that otherwise the counsel might not be able to advise him properly. But how advise them? Is it to advise the criminal to confess his crime and accept the punishment the law provides, or the dishonest client to comply in good faith with his just obligations? If so, it might be admitted that the privilege is quite in accord with sound public policy; but, how, pray, does such advice profit the criminal or the client of dishonest purpose? Why does he need to have his confidential communications to his attorney protected by the law, if, after all, the only result would be to do what any honest man would do without the attorney's advice or assistance, namely, accept the punishment for wrong-doing, and deal honestly with his neighbor? But apparently the purpose of this exemption from disclosure has not been so construed, for it seems that as a part of the obligation of confidence, the attorney is expected to assume the duty

to prevent guilty criminals from being punished, and to assist the shady client to escape his obligations.

Another notable rule requiring the exclusion of evidence is that which forbids either husband or wife to state in court those communications between them which do not take place in the presence of a third person. This rule is of ancient origin. Its beginnings and development in the form in which it is now stated in the statutes or decisions of the court, are obscure. They are so connected in discussions with the disabilities of parties as witnesses, and the disabilities of women in the marriage relation, that through centuries the courts did not distinctly state or point out reasons or principles on which the privilege as now declared is thought to rest.

The opinions do not discuss at any length, or with much logical force, the reasons for this rule of exemption from revealing the truth. They content themselves with the declaration that it is to be justified by what they call a wise public policy. They say that if a spouse were compelled to testify in court as to such communications, it would somehow tend to interrupt "sacred and hallowed confidences" which are declared to be essential to the happiness of married people. Most decisions and text-books dismiss the matter with his somewhat imposing statement, as though every one would immediately see the point without further discussion.

But if we stop to think a moment, just how would the removal of this exemption from giving testimony call upon a husband or wife to reveal a "sacred" or "hallowed" confidence? "Hallowed" or "sacred" confidences are seldom involved in litigation. It is difficult to think of a case where such a disclosure would be material. Would the admission of a husband to his wife that he had committed a crime be such a "sacred and hallowed confidence" that principles of public policy should be invoked to protect it? Could an admission by a husband to his wife that he had injured another by negligence, or that he owed his neighbor a debt, be tortured into a "sacred and hallowed confidence"? Would the disclosure of an admission of such facts in a trial of the issue violate a confidence more "sacred" or "hallowed" than the disclosure of such an admission by a son or a daughter, by a parent, or even by a dear and intimate friend? friend?

Is it not possible that these high-sounding and appealing words may really serve merely to cover the paucity of reasons by which the continued existence of this obstruction in the judicial search for truth can be justified?

It is perhaps in its application to the controversies between husband and wife themselves that the rule is most effective in concealing the truth and defeating justice; for in cases of divorce much material and important evidence is always thus excluded. Even the confession, or the cruel boast, of the husband to the wife, that he has been guilty of adulterous intercourse, may not be stated in evidence by the wife in her suit to dissolve the marriage bond, because, forsooth, to do so would under these "sound principles of public policy," but violate "a sacred and hallowed confidence" necessary to the peace and happiness of married life.

Another ancient rule much invoked to exclude evidence really of probative value, is the so-called "hearsay rule." It can hardly be denied, I think, that hearsay evidence is often of distinct value in showing the truth, and that often, by its exclusion, the truth cannot be made to appear. In such cases, there is a failure of justice, for the court's judgment rest, not upon the truth, but upon its inability to find out the truth.

Most of the important decisions which men are obliged to make in life rest upon what would be called in court hearsay evidence; that is, facts stated by persons not of their own knowledge, but upon information from others. In these days of modern newspapers and easy transmission of intelligence, we are familiar with men and things throughout the world. We know well men whom we have never seen, and we are fully informed of events that we know of only by hearsay. In our own investigation of matters which concern us we seek information from others whose own knowledge is seldom first hand. It is only in the court, where of all places the truth should appear, that the hearsay rule is effective absolutely to exclude all this informative evidence.

Of course no one pretends for a moment that hearsay information is as valuable as that at first hand, but this is far from saying that it has no probative value, or that it ought to be entirely excluded from consideration.

Those who attempt to state the reasons for this rule do not altogether agree. The best opinion seems to be that such statements ought not to be received, because they are not verified by

the oath of the person making them or subjected to the test of cross-examination.

But we all know that honest men may give honest information without being put under oath, and while cross-examination frequently is useful in bringing out the truth, the truth may be disclosed without it. It has been my own observation that in the modern trial, cross-examination quite as frequently emphasizes as refutes the statements of a witness. The question at issue, therefore, seems to be, whether it is better, on the whole, to dispose with truth when hearsay evidence is the only way to bring it out, rather than to take a chance of the statements being truthful and accurate, although not tested by cross-examination.

But the practical reason for the rule probably rests upon a distrust of the intelligence of a jury and the belief that the ordinary man would be pretty certain not to discriminate between statements of persons in ordinary course though apparently without bias or reason to misstate, as compared with testimony verified by oath and tested by cross-examination.

We have found that some of the rules already considered rest upon a distrust of the integrity or honesty of witnesses. This rule apparently is founded upon a distrust of the intelligence of the average man.

The manner in which witnesses are regarded and dealt with in court proceedings also rests in a distrust of their fairness or honesty. The thought has been, apparently, that witnesses called by either party would pretty surely testify with bias and prejudice in his favor, with a strong probability that they would lie for him, if necessary, or, at least, suppress everything within their knowledge favorable to his adversary. Rules were framed, therefore, to apply to a contest in which each band of witnesses would be expected to go the limit for the cause in which they had enlisted, without much regard for the truth of their statements. Hence cross-examination of so-called "hostile" witnesses, — and every witness produced by an adversary was assumed to be "hostile."

Out of this conception sprang, also, the rule which denied the right of a party to contradict a witness by his own testimony or that of other witnesses, and the rule still in force in many jurisdictions which prevents a party who calls a witness from impeaching him. Apparently the notion was that a party should be held responsible for the credibility of his witnesses, and that

he ought not to call any witness who he was not sure would testify in his own favor. It was this rule that for years prevented a party to the litigation from calling his opponent as a witness, because he thus theoretically, at least, guaranteed his opponent's credibility and was unable to impeach it. There are many cases in modern litigation, especially those arising from negligence or conspiracy, where the evidence necessary to support the cause rests with the defendants who are charged with wrongdoing. In such cases, the truth can be ascertained only by the most rigid and searching cross-examination of the defendants themselves — a proceeding quite impossible under this rule.

I think no one will deny that these rules which we have touched upon, and others which might readily be cited, impede the courts in their attempt to ascertain the truth; and that they are sufficient in many cases entirely to defeat the ascertainment of truth and a proper administration of justice. There can be little doubt that by reason of these rules no adequate remedy can be given for many wrongs actually done — not because the evidence on which to found a judgment does not exist, but because these rules prevent the production of such evidence in court.

Of course there are considerations in favor of these rules The general and unlimited admission of hearsay evidence, for illustration, would be most dangerous. Its introduction should be under proper limitations and instructions, which it seems to me might well be left to the discretion and final decision of the presiding judge. There might well be a preliminary finding by the court that first-hand evidence was not attainable; that the hearsay statements were made in ordinary course, in good faith, and with knowledge of the subject.

But conceding the benefit of these old rules centuries ago when they were first applied, and even a limited benefit under modern conditions, the question now is whether their retention is worth while, in view of the fact that admittedly they obstruct, rather than aid, the ascertainment of the truth, and so often result in injustice. Are they worth holding on to in view of the disrepute and criticism into which they have brought the law and our judicial procedure? I believe it to be largely because of these rules that the court procedure is so generally criticized. It must be evident to all of us that the public no longer approve their use. They demand that courts' proceedings be brought

down to date; that they be adapted to the common ways and the common speech of people, and that their technical mysteries and subtleties in exclusion of evidence be abolished. The people at large disapprove,— and rightly disapprove, I think,— the reserve, the strategy, the craft, that now characterize our procedure, and demand that trials shall be conducted as full, open, frank, investigations in which all the facts are disclosed; that procedure be simplified; that tiresome and vexatious appeals be discarded, and that the end of litigation be made expeditious.

There are hopeful signs of better things to come. Text writers generally are now questioning the value of these ancient rules, and in many cases predict their passing. Associations of the Bar in different jurisdictions are taking action. Among others, the recent statements of Mr. Taft, the President of the Bar Association of the State of New York, reflect an enlightened response to the public sentiment of that great State.

Legislatures are taking notice of the situation, and there is evidence that courts of last resort in various jurisdictions, while they hesitate to upset precedents centuries old, adopt expedients that in important particulars nullify the vicious effect of these rules.

May I be pardoned if I speak with some pride of the progress which has been made in these matters both by the legislative enactment and judicial decision in Massachusetts? I speak merely by way of illustration, because while progress in other jurisdictions may have been not less marked, I am less familiar with its details.

In 1898 the Massachusetts Legislature enacted the following measure:

> "No declaration of a deceased person shall be excluded as evidence on the ground of its being hearsay, if it appears to be to the satisfaction of the judge to have been made in good faith before the beginning of the suit and upon the personal knowledge of the declarant."

This measure naturally was considered at the time a radical one. It was adopted with hesitation and with misgivings; but none of the evil which was predicted has been realized. On the contrary, the measure has promoted in no small degree the effective administration of justice. Many cases, just and meritorious, where evidence to sustain them had been lost by death, have

thus been enabled to proceed to righteous judgment. No Massachusetts lawyer would suggest the repeal of the statute.

On the contrary, we hope that the statute may be further extended to cover cases where evidence is lost or inaccessible for causes other than the death of the witness,— because of absence from the jurisdiction, loss of knowledge of the witness's whereabouts, and other similar causes. There would seem to be no valid reason against such extension.

The rule of protection of confidential communications to counsel has been substantially nullified in its practical aspects in Massachusetts. This is the result of the decision of our court in

Woburn v. *Henshaw*, 101 Mass. 193.

The decision and opinion, so far as they affect the question of confidential communications, is written in these few lines:

> "The objection that the defendant was wrongfully compelled to undergo a cross-examination as to what he said to his counsel cannot be sustained. . . . . if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness. This is true even as to defendants in criminal cases."

It is extraordinary that a case of such far-reaching effect on a question which at the time (1869) was so much in controversy should have been thus summarily disposed of, without either extensive consideration of authorities or discussion of the principles of public policy on which the privilege is claimed to be justified.

Neither the significance nor the effect of the decision seems to have been clearly apprehended at the time. The principle was seldom if ever applied (so far as I can ascertain), in actual practice for many years. The case has been but infrequently cited, and there are subsequent decisions which are seemingly inconsistent and difficult to be reconciled, but all doubt in the matter, if any existed, has been dissipated by a recent decision (*Grossman* v. *Rosenberg*, 237 Mass. 122), in which the principle is approved in the statement that

> ". . . . . The rule adopted in this Commonwealth (is) that a voluntary witness waives every personal privilege."

I believe it still to be the law in our Commonwealth that if a party does not voluntarily become a witness, his attorney may not testify as to private communications. But the privilege is the client's, and the waiver by the client throws the attorney open to examination. It is therefore only in cases where a party fails to become voluntarily a witness that the rule has any practical result; and even this privilege is practically valueless, because of a decision that if a party decline to waive the privilege when requested by his adversary to do so, such refusal may be commented upon in argument, and unfavorable inferences be drawn therefrom.

The privilege of communication between husband and wife rests in Massachusetts upon statute. It cannot be waived by the parties. But in a recent decision, the impeding effect of the rule in the presentation of evidence was very much diminished.

It has been decided (*Sampson* v. *Sampson*, 223 Mass. 451) that while the actual conversation may not be stated, yet the fact that a conversation on a certain subject occurred, was admissible, and that from this fact of the conversation and other circumstances, the court were justified in finding that the husband "in some form of words in private conversation with his wife fraudulently represented to her that he had abandoned the libel . . . ."

The theory of the decision seems to be that while we must stick by the principle of public policy that neither spouse may testify to communications with the other, yet if the "sacred and hallowed" communications between them may be found out in some other way or inferred from their conduct, no rule of public policy is violated.

It would seem that if it is of importance to a proper decision that the court should know what was said by the parties in a private conversation, the information would be more accurate and reliable if the parties were questioned regarding it. It would seem, also, that it might be wiser to repeal the statute than to compel the court, in order to do justice, to take such a hurdle in its attempt to ascertain the truth.

About the only thing that one hears in these days in defense of these rules is that their survival through the centuries of development of the common law shows that the rules are useful and above criticism. This sentiment well reflects the conservatism of our profession, our slavery to precedent, our reluc-

tance to blaze out new paths. But does such survival really justify the continued application of these rules? May error claim sanctity simply because of its hoary age?

NOTE IN ANSWER TO SOME OF MR. WHIPPLE'S SUGGESTIONS.

In a letter from Mr. Whipple to the editor supplementing his address he quoted the following sentences from a letter which he received from a distinguished citizen:

> "You say the central difficulty with the law is the procedure. Who made the procedure? It was not the public and to the ignorant outsider it seems, saving your presence, that the law is damned slow in simplifying, expediting, and cheapening litigation."

It is undoubtedly true that many laymen feel this way, but the writer of that letter overstates the matter when he suggests that "the public" did not, and does not, have anything to do with making the procedure. I think the public prejudices have had in the past, still have, and probably will continue to have, a very considerable influence on procedure. I suppose there is no better example of it than the one to which Dean Pound refers in a recent address,—the prejudice against trusting judges with power which must have resulted in a very considerable amount of injustice of one kind or another by checking a development of equity jurisdiction from 1692-1877. This prejudice began as a prejudice on behalf of the Crown's advisors, who feared that local courts of equity would be too favorable to the colonists. Then the citizens of Massachusetts got used to being without courts of equity and the prejudice about judges prior to the Revolution and afterward developed. Although the movement for full equity jurisdiction started with Judge Story before 1810, it took 67 years for the common prejudice, which was not limited to the bar, to be overcome.

There are a variety of other matters in which the public, I think, has a considerable influence,—for instance, our whole district court organization here in Massachusetts has developed as 73 isolated, local courts but, although the suggestion of changing this arrangement and establishing some sort of circuit system, with better paid judges and a more effective modern, elastic plan, was made more than 40 years ago, the public sentiment and local

pride were so strong in favor of local tribunals that nothing happened. It is still so strong, as pointed out by the Judicature Commission, that it is futile at present, at least, to discuss the subject as there is more chance of gradual improvement by accepting the present system and gradually improving what we have.

In the same way, I think the public has been, and probably will continue to be, perhaps, today more strongly than ever, responsible for the privilege which Mr. Whipple criticizes, of a defendant to stand mute as well as the protection against searches and seizures. While I appreciate fully the reasons which suggest abolishing this privilege, my guess is that the current inquisitorial tendencies in government to regulate individual conduct have strengthened popular support of this privilege to such an extent that there is more chance of accomplishing something in other directions.

There is force, however, in the criticism of the rule that the silence of a person charged with crime "shall not weigh against him" because the law cannot control the inferences of a jury on this point and it seems rather absurd that it should profess to do so.

As to communications between husband and wife, *Sampson* v. *Sampson* modifies the effect of the rule in practice. How much justification there is for retaining the statute on the subject is a question about which men probably would disagree vigorously.

As to confidential communications to attorneys, while I think the rule in *Woburn* v. *Henshaw* and *Phillips* v. *Chase*, in regard to waiving the privilege is a sound one, I have never been convinced that the privilege itself should be abolished unless waived. I think there are strong reasons for the existence of the privilege.

At all events, Sir Frederick Pollock, who is certainly not a "stick-in-the-bark" lawyer, has suggested in his little book, entitled, "The Genius of the Common Law," (page 12):

> "Any civilized jurisprudence, for example, must pay some regard to the existence of State secrets which it would be dangerous to the common weal to disclose, and it must afford some protection to domestic and professional confidence; while it will not include in the name of personal freedom an unlimited franchise to defy the law and its officers, although there are people who behave as if it were so and even pretend to think so."

One brief, but pregnant comment on some of the suggestions in Mr. Whipple's address is that the purpose underlying many

rules is to protect society from unscrupulous and suspicious persons, who wish to pry into other people's affairs in the hope of "getting something on them" and using it unfairly. The need of society for some sort of protection of this kind against blackmailers and others is not discussed in Mr. Whipple's address. The lack of adequate recognition of this need weakens the force of his remarks as a whole. This is because, as already suggested, even the title of his address seems to assume that there is no practical need of measures to "protect" the truth from distortion and unfair use in the process of trying to "ascertain" it.

The purpose of some rules, to which Mr. Whipple refers and which have become embedded in the constitution, is to resist the inquisitorial tendencies of human nature which manifested themselves strongly in earlier days and which current events show have not been modified. These inquisitorial tendencies, which characterize both governments and individuals, need some restraint. There does not seem to be a word in Mr. Whipple's address in regard to this very practical and fundamental problem.

As to communications between husband and wife,—without indulging in such phrases as "sacred" or "hallowed confidences", which Mr. Whipple quotes, the practical question is—Should the law on this subject be adjusted to the needs or wishes of the parties in a modern divorce suit? After all, there are other people to be considered and while it may be considered arbitrary to draw the line between such confidences and those between other members of a family, yet, is there not a reason for it, which, as Sir Frederick Pollock suggests, should be recognized by "civilized jurisprudence"?

Is the fact that some husbands and wives abuse this "right to privacy" a sufficient reason for abolishing it? Does not the law merely recognize the fact that it is in the interest of society that even erring people should be able to talk to somebody? So, as to communications to counsel, whatever bad reasons may be given in the law books, we have always understood that the simple good reason for protecting the confidence was the judgment of the community that on the whole the ends of justice were better served by protecting the freedom of communicating by the client, both from "fishing" and from possibly unscrupulous lawyers to whom such confidences may be given.

The right to privacy seems to be largely in abeyance in these days, but there are some reasons for protecting some of it from the

prying "harpies" in the world. The by-products of unlimited publicity, even in court, might be more serious and the cause of more injustice than what Mr. Whipple calls "the concealment of the truth". We think that is the real reason for these two rules and are not yet convinced that is an unsound reason.

The history in Massachusetts of the statute allowing the parties to a suit to testify is an example of the extreme conservatism which sometimes characterizes even the ablest lawers, as suggested by Mr. Whipple. The Commission on the Practice Act of 1851, to which Massachusetts owes so much because of their influence in resisting the attempt to substitute code procedure for common law principles, discussed this question and advised against allowing parties to testify because they did "not think it in the interest of justice or the public morals that parties should be placed in such situations." (See Hall's "Mass. Practice.") The members of this commission who expressed this opinion were: Benjamin R. Curtis, later the distinguished justice of the Supreme Court of the United States who wrote the dissenting opinion in the Dred Scott case; Reuben A. Chapman, later chief justice of Massachusetts; and Nathaniel J. Lord, then a leader of the Essex Bar and brother of Otis P. Lord, who was later a justice of the Supreme Judicial Court. In spite of this advice, the Massachusetts legislature passed the act in 1856 which allowed the parties to testify and the public morals do not seem to have suffered because of it, even though they are not yet perfect.

On the other hand, Mr. Whipple's suggestion that the rules of evidence "were adapted to deal with traits and habits of human character or ruling emotions and motives of the human mind which may have then existed, but which have either disappeared or become much modified and better controlled in our times," is likely to provoke considerable disagreement. While it may, perhaps, be advisable to modify some of the rules of evidence, we certainly should not assume that any "traits or habits of human character or emotions and motives of the human mind" have "disappeared". Even declarations of deceased persons, which are now admitted in evidence in Massachusetts, can sometimes be invented and are not invariably vehicles of truth according to the experience of the bar, and the deceased cannot be cross-examined. While we may have learned that it is safer on the whole to adapt procedure in court to a broader confidence in human nature, we should not fool ourselves with the notion that human nature has changed or shut our

eyes to the common experience of the profession that there are constant streams of parties and witnesses in the courts every day, many of whom are prejudiced or inaccurate in their recollection or testimony or deliberately dishonest. There are many people, including some at the bar, who have no hesitation in "framing" evidence to misuse, distort, or defeat the truth if they are given too free opportunity to do so.

F. W. G.

Additional Note on Declarations of Deceased Persons and Lord Justice Mellish.

The history of the Massachusetts act admitting the declarations of deceased persons, if made in good faith on the personal knowledge of the declarant and before the beginning of the suit, was told in the Massachusetts Law Quarterly for December, 1922, pages 67-68. The act was suggested by the late Professor James B. Thayer and based upon a remark of Lord Justice Mellish in *Sugden* v. *St. Leonards*, 1 P. D. 154, 250 in 1876. The Massachusetts statute follows exactly the suggestion of Lord Justice Mellish, which he, in turn, stated was in accordance with the common law of Scotland.

In view of this direct connection with an important development in our Massachusetts law, the "Spy" cartoon of Lord Justice Mellish is here reproduced for the entertainment of our readers. The English habit of good-naturedly cartooning their distinguished judges for public entertainment does not reflect any disrespect for the bench. On the contrary, it simply reflects a very human relation between the public and the courts. Mellish was a very distinguished judge who did his work under trying circumstances because of great pain from gout in his hands. He commonly sat with Lord Justice James and has been described by a competent observer as an ideal appellate judge.

"In his young days he was an oarsman. His education was of a kind which produces an English gentleman and a scholar. Mellish had no moral drawbacks to the judicial character. His mind was well poised, he was altogether free from conceit and passion. He preserved an equable, unruffled temper, and a courteous, tranquil and easy manner. His strong will subdued his physical infirmity and every other force antagonistic to the full play of his great moral and intellectual powers. His memory will always

"APPEALS."

The "Spy" Cartoon of Lord Justice Mellish from "Vanity Fair" for Dec. 30, 1876.

be coupled with that of James, who was a man of equal intellectual force, but more capable of impressing his personality on his contemporaries and on history." ("A Generation of Judges" 2nd Ed., pp. 109-111.)

F. W. G.

"FONDLING" DEFENDANTS IN CRIMINAL CASES IN THE PRESENCE OF THE JURY.

The following account appeared in the "Boston Post" of August 27, 1925:

"PETS PRISONER TO IMPRESS JURY.

DEFENCE LAWYER USES POLITICIAN TO STAGE SCENE OF AFFECTION TO INFLUENCE VERDICT IN HIS FAVOR.

"Certain Suffolk county politicians are making a regular practice of fondling defendants publicly in the courtroom for the purpose of influencing jury verdicts, according to statements made to a Post reporter by a justice of the Superior Court.

"In a typical case there were three men from East Boston on the jury. Evidently, the defendant's attorney had looked up a man of some prominence in East Boston polities who was acquainted with the three jurymen. During the trial of the case this man came into the courtroom, grasped the defendant by the hand and greeted him with the greatest affection. The East Boston jurymen watched proceedings with obvious interest. While the defence lawyer was making an eloquent plea for acquittal, the politician sat with his arm around the defendant's shoulders and frequently wiped his own eyes with a large handkerchief.

"This is the last word in subtly influencing a jury without openly running afoul of the law, in the opinion of the judge who called the attention of the Post to the practice. He said he had seen the same politician in court on other occasions staging similar demonstrations with various defendants, and that there are many others who appear to be brought into the courtroom by certain lawyers for the same purpose. Sometimes more than one politician has come into the courtroom to fondle the same prisoner at the bar during the trial, depending upon the makeup of the jury.

"The same scheme has lately been tried in civil suits, for plaintiffs as well as defendants, but Judge ——— said it appeared to be more successful in criminal cases."

Note.

It seems as though this form of stage-play might be stopped by the court by some effective method. One method should be to establish the practice of the court that neither the lawyers nor any one else should embrace the prisoner during the trial or in the presence of the jury. Another method would be for the court to call attention to the matter in the presence of the jury, or even

dismiss the jury, as might be done for other improper attempts to prejudice a case. While it may be difficult to suggest the exact method for every case, it seems unfortunate that the public should be given the impression that the court is helpless to protect a case from this sort of improper influence if it is as obvious as the account in the "Post" indicates.

The suggestion that it does not "run afoul of the law" is, of course, mistaken. It is obviously an illegal attempt to influence the jury. Indeed, is seems to fit the definition of a well-known common law crime for, if we turn to Bouvier's Law Dictionary, we find a common law offence described by the peculiarly appropriate term, for the facts under discussion, of "Embracery," as follows:

> "*Embracery*, crim. law. An attempt to corrupt or influence a jury, or any way incline them to be more favorable to the one side than to the other, by money, promises, threats, or persuasions; whether the jury on whom such attempt is made give any verdict or not, or whether the verdict be true or false. Hawk. 259; Bac. Ab. Juries, M 3; Co. Litt. 157, b, 369, a; Hob. 294; Dy. 84, a, pl. 19; Noy, 102; 1 Str. 643; 11 Mod 111, 118; Com. 601; 5 Cowan, 503."
>
> (See also Corp. Jur. under title "Embracery").

The previous paragraph in Bouvier is as follows:

> "Embracecor, criminal law. He who, when a matter is on trial between party and party, comes to the bar with one of the parties, and having received some reward so to do, speaks in the case or privily labors the jury, or stands there to survey or overlook them, thereby to put them in fear and doubt of the matter. But persons learned in the law may speak in a case for their clients. Co. Litt. 369; Terms de la Ley. A person who is guilty of embracery (q. v.)"

It would seem that the court should effectively discourage these "embracecors" whether they are members of the bar or "politicians" supposed to have influence with the jury.

F. W. G.

TWO DIFFERENT NEWSPAPER VIEWS OF A VERDICT AND THE FUNCTION OF A JURY IN A CRIMINAL CASE.

WOMEN JURORS

From "Boston Globe" Aug. 26, 1925.

"If an argument were needed at this late day to convince the public that woman's usefulness is not restricted to the kitchen and the nursery, and that, in fact, her experience and instincts are a distinct asset in civic affairs, we might cite the extraordinary intelligence demonstrated by the jury in the case of the 17-year-old California girl who killed her mother.

"There were seven women and five men on that jury which found the girl guilty of manslaughter. Many juries take simple views of complex problems and thus expose their inaptitude. This jury deliberated for 12 hours—not over the guilt or innocence of the defendant, but over the problem of how to deal intelligently with a manifestly irresponsible juvenile and the whole field of juvenile crime.

"The women jurors were mothers, and certainly qualified to reason from experience. They could not accept the contention that the girl killed her mother 'with malice and premeditation.' They held to the opinion that 'human frailties do not reach these bounds.' They diagnosed the girl's case as 'flaming anger, together with utter inability to act beyond the perceptual level.' The jury was then concerned not with vengeance, but with the problem of rehabilitation of the girl, if possible, while at the same time protecting society.

"It is to be noted that there was no sentimentalizing over the plight of the defendant and no attempt to minimize her responsibility. But this jury considered the problem of juvenile delinquency from a cool, objective viewpoint.

"Juvenile delinquency is now recognized as a scientific problem. The courts engage specialists to deal with it. Here is a jury, largely composed of women, which actually has the intelligence to go beyond its perfunctory duties and render expert assistance. By their very language the jurors revealed their qualifications."

STICK TO THE EVIDENCE.

From "Boston Post," Aug. 26, 1925.

"The jury in the case of Dorothy Ellingson, the 17-year-old girl who killed her mother in cold blood, reports that it spent 12 hours in discussing, not her guilt or innocence, but the problem of her treatment by society. The jury, composed of seven women and five men, finally brought in a verdict of manslaughter.

"This jury was totally ignorant of its real functions and its real duty. The only question a jury has a right to consider is the guilt or innocence of the prisoner. It is this sort of mushy sentimentalizing over the 'problem' of the girl and the 'psycology of her action,' that tends to make some jury verdicts ridiculous.

"Punishments are fixed by law, not by juries. In this case the jury took upon itself the entire authority of the court when it brought in a manslaughter verdict 'in order that she should get a short term in prision.'

"These jurors deserved a severe rebuke for their unwarranted action in usurping power. Juries must stick to the evidence and leave things outside their province alone."

Note.

These two views reflect the conflict between the legal function of the jury which the "Post" refers to and the actual power of the jury which the law has never yet been able to control entirely. Is it harder to control with woman jurors?

F. W. G.

DISCUSSION OF THE POSITION OF CASES ON APPEAL TO THE SUPREME JUDICIAL COURT FROM THE APPELLATE DIVISION OF A DISTRICT COURT.

1. The Opinion in Somers v. *Commercial Insurance Co., 245 Mass.*

Appeals from the Municipal Court of the City of Boston to the Superior Court were abolished in 1912 by an act (now G. L. ch. 231, §§ 108 and 109) which substituted procedure "for the rehearing of matters of law" by "an appellate division of said Municipal Court" on report of the judge who tried the case. It was then provided that "An appeal shall lie from the final decision of the appellate division to the Supreme Judicial Court." The interpretation of the limited original powers of the appellate division of the Boston Municipal Court, based on the language of the act of 1912, in *Loanes* v. *Gast*, 216 Mass. 197, which was decided November 25, 1913, promptly resulted in the passage of ch. 35 of the acts of 1914 in February of that year, which broadened the powers of the appellate division very materially. By the first section of this act it was provided that St. 1913, ch. 716 "shall apply to actions brought in the Municipal Court of the City of Boston so far as the same may be applicable thereto" and that "The appellate division of said court shall have all the powers relating to civil actions tried without jury given by said chapter to the Supreme Judicial Court."

The act of 1913, thus referred to which now appears in G. L. 231, §§ 124–126, provides in § 125 that:

> "The supreme judicial court, upon any appeal, bill of exceptions, report, or other proceeding in the nature of an appeal in any civil action, suit or proceeding, shall have all the powers of amendment of the court below; and whenever exceptions have been taken to the exclusion of evidence, or where the alleged error arises from the omission at the trial of some fact which, under the circumstances of the case, may subsequently be proved without involving any question for a jury, and without substantial injustice to either party, the supreme judicial court shall have full discretionary authority to cause such further testimony to be taken as it deems necessary, either by oral examination in court, by reference, by affidavit or by deposition, and the court shall have power to render any judgment and to make any order that ought to have been made upon the whole case."

By St. 1922, ch. 532, all of these provisions were extended to all district courts.

The purpose of the draftsmen of these acts was to place the responsibility on the District Courts of disposing of litigation within its jurisdiction as finally as the Superior Court. The plan was an elastic arrangement, not for separate courts but for an appellate session of the same court (no more a distinct court than the "motion" or "equity" session of the Superior Court) and the act specifically provided, not for an appeal or a bill of exceptions but for a "*rehearing*" on "a report". Having taken some part in the drafting of the district court act, which was finally adopted in 1922, and being familiar with the history of its preparation and presentation during the previous ten years, the writer is in a position to explain the idea, which it was intended by those who presented it to the legislature, to express. As the opinion in *Somers* v. *Commercial Ins. Co.*, 245 Mass. at p. 289, indicates that this idea may not have been as clearly expressed as it should have been, it may be advisable that the acts should be slightly amended to clear the matter up.

In the trial of the Somers case, the statutory law of Connecticut was involved, and certain sections of the Connecticut statute were offered in evidence and included in the report to the appellate division. At the hearing before the appellate division the parties agreed that the whole Connecticut statute might be considered on the question of interpreting its meaning. The fact of this agreement appeared in the record on appeal to the Supreme Judicial Court. Under the unfortunate Massachusetts rule, the law of another state is a question of fact, of which the court cannot take judicial notice and, accordingly, the statutes must be introduced as evidence. Now if the Somers case had been tried in the Superior Court without a jury the judge who tried the case would have decided all the questions before they went to the Supreme Judicial Court and the agreement of the parties as to the Connecticut statutes would have been considered by him and consequently by the Supreme Court. But under the circumstances the court said, at page 289:

> "It was stipulated after the case had been reported to the Appellate Division, that 'the whole of Chapter 188 of the Connecticut General Statutes Revision of 1918,' containing certain classifications in connection with the sections just referred to, 'may be considered as a fact in evidence for the

> consideration of the case.' But we cannot consider evidence which was not introduced before the trial judge whose rulings are to be affirmed or reversed on the evidence reported. G. L. c. 231, sections 108, 109, 110. *Smith* v. *Tennyson*, 219 Mass. 508. *Burbank* v. *Farnham*, 220 Mass. 514. *Real Property Co., Inc.*, v. *Pitt*, 230 Mass. 526. *Brown* v. *Learmouth*, 228 Mass. 417. *Freed* v. *Rosenthal*, 231 Mass. 357. *Saunders* v. *Smith Granite Co.*, 232 Mass. 1."

After examining the cases cited, we respectfully suggest that they do not warrant the conclusion of the court on this point. Indeed, Judge Loring's opinion in the first case cited, *Smith* v. *Tennyson*, seems to point in exactly the opposite direction as the court did consider and *interpret* the agreement of the parties made before the appellate division in that case.

The view of the appellate division in the Somers case does not fit the plan of the acts providing for such a division, which is not a separate court but the same court and its judgments are the final judgments of that court and the appeal, while it is described in the statute as an appeal "from the appellate division" is really an appeal from the judgment of the court of which the appellate division is merely a part. This seems to be recognized in *Real Property Co.* v. *Pitt*, 230 Mass. 529. The proceeding before the appellate division is merely a continuation in the same court of the hearing before the trial judge. It is literally a "*rehearing*", as distinguished from an appeal or exceptions heard in *another* court. Accordingly, as no jury was involved, there seems to be no reason why the parties should not agree that the appellate division should consider anything they wish to offer, whether it was in evidence before the trial judge or not. The question which modern time-saving practice requires is not whether the trial judge shall be sustained or the case sent back but whether justice can be administered without sending it back.

The case is not finished in the Municipal Court until the appellate division gets through with it and, accordingly, it would seem that the Supreme Court should deal with the case as it appeared before the appellate division and should not confine itself to the case as it was presented to the trial judge. What interest of justice is served by ignoring what the parties have agreed that the court might consider? If the appellate division had taken additional evidence by deposition, affidavit, or by ordering further trial of part of the case, as it sometimes does under G. L. ch. 231, §§110 and 125, above quoted, facts thus shown although not before

the original trial judge, would presumably have been considered by the Supreme Court on appeal as they would have been part of the case. At all events the draftsmen of § 125 in 1913 intended to make them part of the case and the language seems broad enough for the purpose. Why is an agreement of parties as to foreign law different in this respect?

The lack of elasticity in the relations of courts in Massachusetts has been one of the causes of delay and administrative problems of various kinds. This elastic appellate arrangement in the same court was intended to avoid such problems and it seems desirable that these acts should be liberally construed in the light of this principle of elasticity, in order to avoid such results as that in the Somers case. In order to make this clearer, it might be advisable for the legislature to amend G. L. 231, §109, and the act of 1922 by providing that the appeal to the Supreme Judicial Court "shall lie from the final decision of the Municipal Court of the City of Boston by its appellate division," thus emphasizing the fact that the Supreme Judicial Court is to deal with the case as it was presented *there* and should not go over its head to the trial judge who acts merely in the preliminary stage of the case and does not fully complete the trial of the case if a report is made or claimed.

2. Should Not a Copy of the Opinion of the Appellate Division Accompany the Record on Appeal?

As a matter of practice also it seems unfortunate that the opinion of the appellate division which is filed in the case is not sent up with the record on appeal so that the Supreme Judicial Court may have the assistance of that opinion in considering the case. The record seems incomplete without the *reasons* of the appellate division. When counsel are often so lax in the preparation of briefs a considered judicial opinion of three judges of the district court ought to be read by the Supreme Judicial Court before it passes on the appeal.

The explanation of the practice appears in the case of *Cohen* v. *Berkowitz*, 215 Mass. 71, in which, on an appeal from the Appellate Division, there were printed in the record before the court "besides the report of the trial judge and the judgment of the Appellate Division and the appeals therefrom," among other things, "the memorandum of the judges of the Appellate Division filed with their judgment." In the opinion the court said:

> "Upon the argument of the case before the appellate division, the judges filed what is termed 'Opinion and Final Order,' copy of which is printed in the record. Such opinion is no part of the record. It has been decided many times that a decision or memorandum by a judge of the Superior Court or a single justice of this court, in an action of law is no part of the record. *Cressey* v. *Cressey*, 213 Mass. 191. *Given* v. *Johnson*, 213 Mass. 251. *Regal* v. *Lyon*, 212 Mass. 230, 231. The same principle applies to the proceedings under this chapter. While such opinion may serve a useful purpose, and be valuable to the parties, it is no part of the record upon which the case is to be argued in this court."

Turning to the cases cited, we find in *Cressey* v. *Cressey*, 213 Mass. 91, the statement:

> "A bare memorandum by a judge sitting without a jury in a proceeding at law forms no basis for an appeal grounded on an error of law and can not be considered as a part of the record, however useful it may be for the information of the parties and as a foundation for other steps in the case. *Regal* v. *Lyon*, 212 Mass. 230, and cases cited. *Lopes* v. *Connolly*, 210 Mass. 487, 496. This is a proceeding at law and not in equity, where in this respect the rule is different. *Cohen* v. *Nagle*, 190 Mass. 4. Errors of law under these circumstances can be taken advantage of only by a bill of exceptions. *New York Life Ins. Co.* v. *Macomber*, 169 Mass. 580. Findings of fact embodied in a bill of exceptions or a report of course are a part of the record."

Turning to the case of *Cohen* v. *Nagle*, 190 Mass. 4, thus referred to which was an equity case arising on a report, the court said:

> "The justice who heard the evidence filed a 'memorandum of decision,' which is a report of his findings of fact. A preliminary question is whether this is a part of the record, which has the effect of such a report made under the R. L. c. 159, §23. We are of opinion that it is. It is a convenient and proper practice to put upon the record a report of facts found, in order to present, in a succinct form, the substance of the conclusions from the evidence on which the decree is founded. This brings directly to the attention of the court that which, in some jurisdictions, is found in long recitals in the decree. The statute just referred to makes the filing of such a report compulsory upon the justice, if an appellant requests it within four days after he has been notified of the filing of the decree. The findings stated in such a report will not be set aside unless they are plainly wrong, and we are of opinion that the presiding justice may, in his discretion, file such a report voluntarily, which shall have the same effect as one filed under the statute."

In *Given* v. *Johnson*, 213 Mass. 251, also cited above, the court said, "It has been decided many times that even a memorandum signed by a judge in an action at law is not a part of the record unless inserted in a bill of exceptions or report."

The test of what is strictly part of the record, therefore, seems to be whether the document is required to be filed by the court below or whether the court below inserts it in a "report". Otherwise, nothing which the judge files in the case, however valuable it might be for the assistance of the Supreme Judicial Court, can get into the record. The rule in this respect seems to be considered by the court, from the sentences quoted in the Cressey case, more strictly in cases at law than in equity.

The trouble with applying such tests as to what is strictly a part of the record, to an appeal from the appellate divisions, is, that the "record" is treated as an absolute thing, when it seems really to be a relative thing, the contents of which may vary with the purpose for which it is needed. Whatever may be the reasons for the contents of the record in other cases, to practising lawyers, who render opinions to their clients which often govern practical affairs as much as, and sometimes more than, many opinions of the Supreme Judicial Court (because the matters on which they advise never get into court and yet may guide the conduct of large enterprises affecting the interests of many people) this practice of the court in not having before it the reasons of the court below seems extraordinary. No senior counsel in preparing an opinion would act without seeing (if he could) the carefully prepared views of a junior who had already considered the matter. It is not uncommon for junior counsel to change the opinion of their seniors by convincing reasons. No body of business men considering an important matter would be likely to act without examining the full report of somebody else who had studied the subject if it were available. Why should there be a different practice in dealing with questions of law on appeal?

With the pressure of modern business and the laxity already referred to of many counsel in the preparation of briefs, it is in no sense disrespectful to suggest that the Supreme Judicial Court needs, and ought to have before it, all the preliminary discussions of a case which have been filed by the tribunal appealed from.

The Statute, G. L. 211, s. 8, does not require the Supreme Judicial Court in cases submitted to it to file anything but "a rescript containing a brief statement of the grounds and reasons

of the decision". But, if a case is subsequently carried to the Supreme Court of the United States after the decision of the Supreme Judicial Court of Massachusetts, it is not conceivable that the court in Washington would confine its study of the case to the rescript without examining the fuller statement of the reasons of the Supreme Judicial Court of Massachusetts contained in the opinion filed in addition to the rescript although such an opinion is not required by law.

Most of the business which is done by the Municipal Court of the City of Boston never comes near the Supreme Judicial Court. Comparatively few cases go up on appeal from the Appellate Division. The practice in that court necessarily must be governed ordinarily, therefore, by the rulings of the Appellate Division and the same will be true to an increasing degree in the district courts generally. Accordingly, when the Appellate Divisions state their reasons for a particular decision, perhaps on matters of practice constantly coming before them with the nature of which they may be more familiar than the justices of the Supreme Judicial Court, the sound development of our system seems to require that those reasons should be considered by the court on appeal before the appeal is disposed of. Otherwise, decisions are likely to be made which may make further legislation necessary.

One unfortunate result of the present practice, which is probably not realized by the Supreme Judicial Court, is that very frequently points raised by a report of the trial justice are waived at the argument before the Appellate Division and the case decided on the remaining points. The appeal being general the points waived below reappear in the record and may revive in argument before the Supreme Judicial Court on appeal while the fact of waiver, which is usually mentioned in the opinion of the Appellate Division, does not appear in the record and the Supreme Judicial Court has no knowledge of it unless informed by counsel.

The statutes of recent years developing the district courts of Massachusetts into more important and responsible tribunals have resulted from the professional efforts of many members of the bar as well as of justices of the district courts, all of whom have done what they could to assist the legislature in developing the judicial system to meet the needs of the community. The statutes thus drafted may not expressly cover every detail of what is to be done. It is important, however, that the bar should have the sympathetic interest and support of the courts in working out simpler and more effective practices such as the community expects.

So as to these opinions—the Supreme Judicial Court can, of its own motion, establish the practice by rule or otherwise that typewritten copies of the opinion of the Appellate Division, or at least one copy, shall accompany the record on appeal. There is no danger of the development of a system of printed reports of intermediate courts such as exist in other states.

We respectfully express the hope that the practice in this respect will be changed.

F. W. G.

COMMENTS BY DEAN POUND ON CRIME AND THE CRIMINAL LAW.

The common occurrence of crimes of violence, the articles of Richard Washburn Child which have been appearing every two weeks in *The Saturday Evening Post* beginning August 1, 1925, under the title "The Great American Scandal", and the current discussion of the administration of the criminal law all over the country have focussed public attention on the subject. In view of the enormous circulation of *The Saturday Evening Post*, Mr. Child's articles should be read by those who wish to know how the situation is being presented to millions of the American people whether they agree with what he says or not. On August 29th, the following comments by Dean Pound appeared in the *Boston Herald*. They are here reprinted as professional news exactly as they appeared, and without comment, for convenient reference and study.

"ROSCOE POUND ON CRIME."

[*From The Boston Herald, August 29, 1925.*]

(The Herald recently asked Dean Pound of the Harvard Law School, probably our foremost authority on judicial administration, to write a series of articles on crime, crime preventives, and the administration of criminal law. He replied that he lacked the time for such an undertaking. He was good enough, however, to write a private memorandum for the guidance of anybody whom The Herald might engage. This memorandum seemed such an admirable summary of the whole situation that The Herald requested permission to publish it in full. Dean Pound finally consented, although with some reluctance, as he had written the memorandum with no thought that it was to be published.)

By ROSCOE POUND.

Dean of the Harvard Law School.

There is very little exact information available. A skillful writer may write attractive articles, such as Mr. Child's. But for a student of American criminal justice to write anything that will do much good is another matter. Such things as the controversy between the district attorney and the police commissioner in Boston, or the recent controversy between Mr. Goodwin and the district judges, are illuminating. Each blames the other. But I doubt whether at bottom either is much at fault.

The whole system, judicial and administrative, is ill-adapted to its tasks. Each sees his own difficulties, but not the real source of them, and attributes them to the other. The trouble is not with the officials but with the system in which they are entangled. Again, there is a general and somewhat blind hue and cry against too many laws. Yet when things do not go as we wish, there is at once a vigorous cry for legislative action.

Those who habitually cry out against so many laws were not the least active last winter in forcing upon the Legislature a very doubtful law interfering with that individualization of penal treatment, which is necessary to the administration of justice and will come about, in one way or another, in spite of all statutes. My fear is that, for a time, much unwise legislation and some unwise magisterial action, which will but aggravate the situation, will be the chief result of the magazine, newspaper, pulpit campaign which is now on.

As things are, it is not possible to make any intelligent comparison of crime in America with crime in other countries. We keep no adequate or reliable statistics, and the labor involved in getting at the facts, even for a given locality, is prohibitive. Moreover, in continental European countries, much that we treat judicially is dealt with administratively and does not figure in judicial statistics. Hence, supposing we had any reliable American statistics, much allowance would have to be made. A great deal more of detailed knowledge of continental administration is called for, in order to make any useful comparisons, than any of us have, even if we knew what the facts are for this country. Not a little depends on what is called "crime". If all violations of police and administrative regulations were to be classified, as with us, and there was a prohibatory law to be enforced, figures from European cities might look different. I have seen figures as to "homicides" in the United States which included every automobile killing, on the ground, I suppose, that it was presumably a manslaughter.

Undoubtedly there are some peculiar American conditions making for "crime". But America is a large order. It includes huge urban areas, some of which have almost grown up over night, like Cleveland, or Detroit, or Los Angeles, some on sites settled within a century, like Chicago. It includes frontiers, like the Texas-Mexican border and communities where the memory of the frontier is yet green. It includes communities like Oklahoma, opened to white settlement within a generation. It includes mountain communities where the feud has hardly ceased to flourish as a social institution. With these it lumps the old settled communities of the Atlantic coast and the average law-abiding rural community. Sir John Fortescue said that more men were hung for violent crimes in England in a year than in France in ten years; and he thought the reason was that the English had more "heart"—i. e., more courage. Something of the pioneer independence and resentment of control is no doubt behind much of what we are now denouncing as a lawless spirit—as if it were something new, instead of a characteristic American phenomenon from colonial times to the present.

But much more of what seems current disregard for law is connected with the change from a rural, agricultural society to an urban, industrial society. Modern urban life is so specialized, and demands of necessity so much in the way of police and regulation and administration, that the reasons for legal precepts are no longer on the surface, and do not make an effective, immediate

appeal to the sense of right of the mass of the people in their everyday action. As Americans tend to think for themselves, instead of doing blindly and trustingly what they are told to do, a great deal of ignoring or evading of legal precepts has always gone on.

From the head of a big business, chafing under legislative restrictions on the conduct of his business, with well-paid counsel to advise him how to evade them, or the owner of a new Ford, who can see no sense in the latest traffic regulation, there are infinite gradations of self-reliance, righteous protest, indifference, lawlessness, and crime. But these are no new phenomenon. Simply with the growing complexity of our urban, industrial life it is more noticeable and often more serious in its results. We shall have to learn better. But we can't change all at once the modes of thought that have governed Americans for three centuries.

We have got to learn the art of administration. Little administration was needed in rural, agricultural, pioneer America. Our inherited mode of thought was averse to administrative government. Our bills of rights call for governments of laws, not of men. But it takes men to do things speedily and with some individualization of results; and a huge metropolitan area requires the speedy doing of many things. The crude doings of things speedily and crude individualizations of application that go on while we are learning, with the accompanying favoritism, political pull, even graft, or, on the other hand, the stupid stickings in the bark of the law, do not increase respect for our legal order.

Moreover, our whole science of law in the past has ignored the subject of enforcement. We had supposed it was enough to consider whether legal precepts were abstractly just. Enforcement was supposed to be no concern of the lawyer. Some said if laws were not enforced it was the fault of the executive. Some said if laws were not enforced, it showed that they were not really laws. If they truly expressed abstract justice, their intrinsic appeal to the individual conscience would make them effective in action. Others said that if they were not enforced it showed that they did not have their roots in the life of the people. We must give over this sort of a priori dogmatism about enforcement. The whole subject needs to be studied scientifically so as to give us some reliable data as to what laws are effective and what enforcing agencies achieve their purpose, and why.

Not a little of what has just been said is of world-wide application. A transition is going on everywhere. Strain upon law and upon legal institutions is not at all confined to us. Conditions since the war and since the Volstead act have brought home to everyone in America what jurists had been discussing in many lands for the last 25 years.

As to the agencies to which we should look, I suppose they must be all the agencies that make for intelligence, understanding of the facts, and social improvement. But the most important point just now is to ascertain the facts. Very little of what is said and written on this subject has any sure foundation in exact knowledge of the facts. Next we must provide for competent and intelligent study of the facts. As things are, it is nobody's business to gather and verify them or to study them. What is done in this way is done for some special purpose and to prove some preconceived point. Perhaps the first step toward something better would be adequate provision for research.

Our whole system of criminal justice, devised for rural, pioneer, agricultural America (and still working reasonably well in rural communities, where the conditions obtain for which it was devised) needs to be studied functionally with reference to the needs of urban, industrial America of today. I wish it were possible to have a survey of criminal justice in Massachusetts, doing better for a whole state what Prof. Frankfurter and I sought to do in the Cleveland survey. Then we should be able to put a better valuation on the projects that are submitted to the Legislature and advocated more because it is evident that something should be done than because it is clear what that something is.

Also the whole subject of legislation—what it can do well, what it can do passably, and what it can't do—needs to be studied functionally. A century ago we distrusted courts and executives and trusted the Legislature. Now we distrust the Legislature, in comparison. But courts, and to some extent executives, labor under checks that come down from our distrust of them. In particular we need to study the relations of law and administration. Also we need to study judicial organization and administration functionally.

In short, before we shall have the data on the basis of which we may expect to achieve anything of lasting value, we shall have to have research—long continued and scientifically and impartially carried on. I have been studying this subject since 1906, and have

at least learned that no one man is equal to the whole of it for the whole country. I hope that before long reasonable endowment of research may be provided in our better law schools. Such endowment could not fail to be fruitful. Nowhere else is there opportunity, nor are there equal facilities for doing the work continuously, scientifically, and free from political influence. Hysterical crusades, without any solid basis in scientific ascertainment of the facts, are likely to produce such things as the legislation taking away the control of trial judges over the trial, which began in North Carolina in 1795, and spread over the South and West in the last century, to the detriment of American judicial administration; or the legislation of what one might call the "Jefferson Brick" era of American institutions, in which, as a result of legislative overconfidence, popular impatience at the slow adaptation of English law to American conditions, and, it must be confessed, the overconservatism of lawyers, who were not willing to take the lead in intelligent reform, many unfortunate features of American criminal justice, which vex us today, had their origin; or the reform of procedure in New York in 1847, which made judicial procedure in that state technical, dilatory and expensive for two generations.

A DISCUSSION OF THE VALUE OF DECLARATORY JUDGMENTS IN 1903 FROM AN ENGLISH LAW MAGAZINE.

"DECLARATORY JUDGMENTS OR ORDERS.

[*From The Law Times, Aug. 15, 1903, Vol. 115, p. 365.*]

"The usefulness of that 'innovation of a very important kind'—as it was styled by Lord Lindley, then Master of the Rolls, in his judgment in *Ellis* v. *Duke of Bedford* (80 L. T. Rep. 332, at p. 337; [1899] 1 Ch. 494, at p. 515)—which was introduced by Order XXV., r. 5, was strikingly illustrated by the recent case of *Young* v. *Ashley Gardens Properties Limited* (87 L. T. Rep. 547, on appeal, 88 Ib. 541). The rule provides that: 'No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby; and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not.' Prior to that rule, a judgment declaratory of existing or future rights was never made in common law actions. Nor was it customary for the old Court of Chancery to make declarations which did not relate to some right to present relief. The court declined to entertain a bill which raised a mere abstract question, and where no substantive relief could at present be given. For, although the court had, under sect. 50 of the Chancery Procedure Act 1852 (15 and 16 Vict. c. 86), power to make binding declarations of right without giving consequential relief, it was decided by Vice-Chancellor Wood in *Rooke* v. *Lord Kensington* (2 K. and J. 753) that such power would only be exercised in cases in which some equitable relief might be granted if the plaintiff chose to ask for it: (see also *Jackson* v. *Turnley*, 1 Drew, 617; and *Bristow* v. *Whitmore*, 4 K. and J. 743). And that practice of the Old Court of Chancery seems to have been adopted by the Chancery Division after the passing of the Judicature Acts up to the time, 1883, when Order XXV., r. 5, was made; (see *Cox* v. *Barker*, 35 L. T. Rep. 685; 3 Ch. Div. 359, at p. 372). Indeed, in 1888, even after the then new rule had come into operation, enlarging as it did the jurisdiction conferred by sect. 50 of the Chancery Procedure Act 1852, it was argued in the case of *Brooking* v. *Maudslay, Son, and Field* (58 L. T. Rep. 852; 38 Ch. Div. 636, at p. 641) that the court ought not to make a declaration unless relief could follow upon it inasmuch as the new rule, being only slightly wider than sect. 50 of the Act of 1852, had made no alteration enabling it so to do. That no such limitation, however, exists abundantly appears

from the numerous subsequent authorities which have been decided under the rule, of which *Young* v. *Ashley Gardens Properties Limited* (*ubi sup.*) is as strong as, if not stronger than, any other, and affords a notable example of what the court will do. It entirely removes any doubt as to the jurisdiction of the court, if such still prevailed.

"In that case the lessee of a flat brought an action against his landlords, a limited company, to obtain a declaration that he was entitled to a license to assign the premises free from a proviso which the defendants sought to attach thereto. The plaintiff had covenanted not to assign, underlet, or part with the possession of the flat without the license in writing of the defendants; but the same was not to be 'unreasonably or arbitrarily withheld.' The defendants had granted a license as desired by the plaintiff, but imposed the terms that, if in consequence of the assignment the rateable value of the property was increased, the plaintiff and the assignee, or one of them, would pay any future increase. According to the lease, all existing and future rates and taxes were payable by the landlords, so that the condition subject to which the license was to be granted was not unnaturally objected to by the plaintiff. Mr. Justice Joyce, before whom the action was tried, held that the plaintiff was entitled to the declaration claimed by him, and the Court of Appeal affirmed the learned judge's decision. Lord Justice Williams did not question the power of the court to make a declaratory order under the circumstances; while Lord Justice Cozens-Hardy remarked that he could not imagine an instance of a more beneficial exercise of the jurisdiction to make such an order than had been done in this case.

"Seeing that the plaintiff's action, after a certain amendment of his writ and statement of claim had been effected, was strictly confined to asking for a declaration that he was entitled to a license to assign his flat untrammelled by any condition, no more forcible instance of an application of Order XXV., r. 5, could be suggested. It was a declaratory judgment pure and simple for which the plaintiff asked, all consequential relief being eliminated from his claim; and the power to grant it was utilized by the Court. 'It is a power which must be exercised with great care and jealousy,' said Lord Justice, then Mr. Justice, Chitty in *Austen* v. *Collins* (54 L. T. Rep. 903, at p. 905); and, as the same learned judge observed in a later case (*Re Berens* [1888] W. N. 95), the power is a discretionary one, depending upon the circumstances of each case.

But, at the same time, it is a power which the court, in its discretion, ought freely to take advantage of, since a declaration concerning present or future rights is binding upon the parties to the proceeding, and prevents them from again litigating the same question. In complete harmony with it is the power to determine, upon an application by originating summons, any question of construction arising under a deed, will, or other written instrument, and to declare the rights of the persons interested: (Order LIV., A. r. 1; R. S. C. Nov. 1893).

"The extremely wide terms of the concluding phrase of Order XXV., r. 5, ought, it has been contended in several of the cases, to be read with some qualifications: (see, *inter alia, Grand Junction Waterworks Company* v. *Hampton Urban District Council*, 78 L. T. Rep. 673; [1898] 2 Ch. 351). It is manifest, however, from the explicit language used that the declaration need not be claimed as a step towards obtaining some present relief; and an action can be brought solely for a declaration as to present or future rights. Nevertheless, the court may refuse to make a declaration as to the future rights of parties in an event which has not yet happened. It has been held by Mr. Justice Buckley that an action would not be maintainable at that stage: (*Honour* v. *Equitable Life Assurance Society of the United States*, 82 L. T. Rep. 144; [1900] 1 Ch. 852)."

Note.

Since 1903 when the following article appeared the development of the practice has become so common in the English courts that Prof. Sunderland (who has recently made a study on the spot of their practice in civil cases) reported in an address to the American Bar Association at its meeting in Detroit this year, that

"So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work is done."

The Judicature Commission recommended an act to provide for declaratory judgments in 1921 (see Report, pp. 113, 154, MASSACHUSETTS LAW QUARTERLY for January, 1921). The National Conference on Uniform State Laws recommended an act in 1922. These acts were compared and discussed in the QUARTERLY for Dec., 1922, p. 99 and again in Feb., 1923, p. 61. The subject is now under consideration by the Judicial Council. F. W. G.

AN IMPORTANT OPINION OF THE NEW YORK COURT OF APPEALS UNDER THE COMMERCIAL ARBITRATION ACT.

In the Matter of Arbitration between AMERICAN EAGLE FIRE INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY, FIDELITY-PHENIX FIRE INSURANCE COMPANY, GLENS FALLS INSURANCE COMPANY and HANOVER FIRE INSURANCE COMPANY (Severally and not Jointly), Respondents, and NEW JERSEY INSURANCE COMPANY, Appellant.

(Decided July 15, 1925.)

APPEAL by New Jersey Insurance Company from order of Appellate Division, first department, affirming order of Special Term, which denied motion of New Jersey Insurance Company to confirm the award made by arbitrators and vacating said award.

The facts herein are as follows: In the year 1920, pursuant to an agreement made in the latter part of December, 1919, New Jersey Insurance Company, appellant, issued one or more policies of re-insurance to American Eagle Fire Insurance Company, The American Insurance Company, Fidelity-Phenix Fire Insurance Company, Glens Falls Insurance Company and Hanover Fire Insurance Company.

New Jersey Insurance Company refused to pay losses under the re-insurance policies, claiming that they were invalid because of alleged misrepresentation and concealment. Accordingly, under date of August 22, 1922, the parties executed an agreement and submission to arbitration in which the dispute as to the validity of the policies was submitted to three arbitrators. Two of the arbitrators, Mr. Osborn and Mr. Ullman, were named in the arbitration agreement, and the third arbitrator, Mr. Cox, was later appointed by written agreement between the parties.

The arbitration agreement provided that an award should be made on or before November 1, 1922. This date was extended to December 1 by written agreement. The first hearing before the arbitrators was held on November 2 and hearings continued thereafter from time to time to December 4, 1922. A large number of witnesses were examined, approximately four hundred pages of testimony were taken and a large number of exhibits were submitted. At the request of the arbitrators the time within which the award might be made was first extended to December 15 and was later

extended to December 22, 1922. Briefs were submitted to the arbitrators on December 16 and several sessions were held by them to discuss their decision. On the afternoon of December 21, the day before the date on which the award was required pursuant to the last extension, the arbitrators held a meeting and requested that the parties agree to a further extension of the time within which an award might be rendered. This was agreed to by the five companies but was refused by New Jersey Insurance Company. Mr. Osborn, one of the three arbitrators, then stated at this meeting on December 21, in the presence of the other two arbitrators and of counsel for both parties, that he felt he could not do justice to the case in the short time remaining, namely, prior to midnight of the following day, and that unless a further extension were granted he would resign. Meanwhile, Mr. Osborn had been in touch with respondent's attorneys and was obtaining cases from them to sustain their side of the controversy. A further meeting was held on the morning of December 22, at which Mr. Cox and Mr. Ullman, two of the arbitrators, were present. At this meeting was presented and read a letter from Mr. Osborn in which he said: "I must and do therefore resign." Mr. Osborn was not present at this meeting and took no part in any of the proceedings after the meeting of December 21. After discussion Mr. Cox stated that he and Mr. Ullman would spend the rest of the day in going over the evidence, exhibits and briefs and that if he and Mr. Ullman, the other arbitrator, could concur in a decision they would render an award. An award was made and signed by them.

The first paragraph of the arbitration agreement provided as follows:

"*First.* The parties hereto name and appoint Frank H. Osborn and Albert Ullman as two of the three arbitrators herein provided for. In the event that Frank H. Osborn shall refuse to act as such arbitrator, or having accepted the appointment hereunder *shall later cease to act as such arbitrator through death, resignation or otherwise, the parties of the first part shall elect an arbitrator from among the individuals* named in the list of 'Proposed Arbitrators,' annexed hereto," and so as to each of the other arbitrators.

"*Fourth.* It is understood and agreed that the arbitrators, or a majority of them, are to determine whether or not the said policies are unenforcible by reason of any misrepresentation or concealment of material facts by the agent or agents of the parties of the first part or any of them.

"In the event that the arbitrators, or a majority of them, shall find and determine that the said policies are so unenforcible they shall find in their awards that nothing is due from any of the parties hereto to any of the other parties hereto, arising out of the issuance of said policies.

"*Fifth.* . . . The awards shall be in writing, shall be subscribed by all of the arbitrators *unless only two of the arbitrators shall agree upon said award*, in which case it shall be signed by the two arbitrators so agreeing. . . . *An award by a majority of the arbitrators shall be valid and binding.*"

On December 20, 1923, New Jersey Insurance Company brought on for hearing before Special Term a motion to confirm the purported award made by the two arbitrators following the resignation of Mr. Osborn. The Special Term denied the motion, holding that under the express provisions of the first clause of the arbitration agreement, the two remaining arbitrators were without power to make the award, in view of the fact that Mr. Osborn, the third arbitrator, had resigned or ceased to act and held that the purported award was a nullity and vacated it. On appeal the Appellate Division unanimously affirmed without opinion the order of Special Term. The matter is now before this court as the result of leave to appeal granted by this court.

Frederic R. Coudert for appellant.

D. Roger Englar for respondents.

Julius Henry Cohen and *Kenneth Dayton* for the Chamber of Commerce of the State of New York, intervening as *amicus curiae*.

POUND, J. The question is whether, after the final submission of an arbitration, one of three arbitrators may by his resignation prevent the other two arbitrators from making a valid award under a submission providing for an award by a majority and for the filling of vacancies in case an arbitrator resigns. It is contended on one hand that, while the final award may unquestionably be made by a majority of the arbitrators, nevertheless in case of a vacancy by resignation before the final award is made, the agreement requires literally the choice of a substitute arbitrator before an award can be made; it is contended on the other hand that the arbitration proceedings proper, which require all the arbitrators to act, and when the case is finally submitted to the arbitrators for their decision and that the withdrawal of an arbitrator thereafter is as of no more importance than the equivalent of a dissent.

The Legislature by the enactment of the Arbitration Law of 1920, and this court by upholding broadly the constitutionality of the statute (*Matter of Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261), have given a new importance to arbitration tribunals set up by the parties as a substitute for the courts in the settlement of controversies. To approach the consideration of the question we may, therefore, properly bear in mind the development of the common law of arbitration through the statutes to its present stage.

But first, the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor. The oath of the arbitrators is the rule and guide of their conduct. Civil Practice Act, section 1452, prescribes the form of oath as follows: "Before hearing any testimony, arbitrators selected either as prescribed in this article or otherwise must be sworn, by an officer authorized by law to administer an oath, *faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding.* . . ." The oath may be waived, but the obligation remains. Although a known interest does not disqualify and the parties may not complain merely because the arbitrators named were known to be chosen with a view to a particular relationship to their nominator or to the subject-matter of the controversy, they are entitled to expect that arbitrators thus chosen will proceed with indifference and impartiality.

Viewed with this background, the law forbids the arbitrator, even though he acts with good intentions, so to conduct himself as

to defeat the purpose of the arbitration by acting either for his own convenience or in the supposed interests of the party by whom he is named, except as he has, under Civil Practice Act, section 1453, the naked power to withdraw before all the proofs and allegations are heard. (*Matter of Bullard* v. *Grace*, decided herewith.) He accepts responsibilities to which convenience and favor must defer. We may assume that Mr. Osborn's conduct was inspired by the best of reasons and with no intention to frustrate the arbitration for ulterior ends. Another might follow the same course of conduct that he followed with an eye single to his own convenience or interest of his nominator to avoid an adverse decision. Such an untoward result should be avoided unless the law applicable to arbitrations permits the arbitration to be brought to so impotent a conclusion.

The provisions of the Civil Practice Act so far as practicable and consistent apply to arbitration agreements. Material provisions are as follows:

"§ 1451. Hearings by arbitrators. Subject to the terms of the submission, if any are specified therein, the arbitrators selected as prescribed in this article must appoint a time and place for the hearing of the matters submitted to them, and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing from time to time upon the application of either party for good cause shown or upon their own motion, *but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission or their attorneys.*"

"§ 1453. Power of arbitrators. The arbitrators selected either as prescribed in this article or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers with respect to all the proceedings before them which are conferred upon a board or a member of a board authorized by law to hear testimony. *All the arbitrators selected as prescribed in this article must meet together and hear all the allegations and proofs of the parties; but an award by a majority of them is valid unless the concurrence of all is expressly required in the submission.*"

The scheme of the law thus divides the arbitration proceedings into two parts: (a) the hearing, and (b) the decision and award. All the arbitrators must hear the allegations and proofs of the parties but an award by a majority of them is valid unless the sub-

mission otherwise provides. Even when prior to the enactment of the Arbitration Law of 1920 agreements to arbitrate and submissions were arbitrarily revocable up to a certain stage in the proceedings, the Code of Civil Procedure, section 2383, drew the line thus indicated between the hearing and the award. It read: "A submission to arbitration . . . cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision." Now that agreements to arbitrate are no longer revocable at the will of the party but may be enforced by a party who is aggrieved by a refusal to proceed to arbitration, this limitation no longer has a place in the law and has been repealed, but it is significant that even under the earlier practice a party who stayed in until the final submission to the arbitrators for their decision could no longer trim his sails to shift his course when the wind of defeat began to rise.

At common law more latitude was allowed as to the hearing. Where the submission was to three with power to two to make the award, two had power to hear where the third was notified and refused to attend or was willfully absent (*Crofoot* v. *Allen*, 2 Wend. 494), but by the Revised Statutes (now Civil Practice Act) all the arbitrators were required to hear all the proofs and allegations of the parties, otherwise the award was a nullity. (*Bulson* v. *Lohnes*, 29 N. Y. 291.) No further change was made in common law. It is not said that all the arbitrators must participate in making the award. That is an exception to the general rule which may be expressly stipulated for by the parties. All the arbitrators should be notified to meet for the deliberation so that opportunity for full consultation is furnished but it is not the rule that one may then by willful absence,—and resignation at this stage is no less than willful absence,— prevent an award by a majority. All should meet and hear the proofs but the report of two is valid unless the third has been excluded from participation in their deliberations without fault on his part. The refusal of the third arbitrator to attend after final submission ceases to be material when its effect would be to juggle one of the parties out of the benefit of the arbitration. (*Carpenter* v. *Wood*, 42 Mass. 409.) If an arbitrator may resign at the last moment, if concert of the action in reaching a decision as distinguished from the award itself is necessary, no award could be reached in any case if at the eleventh hour one of the three found himself in the minority and sought to serve his own

interests or those of the party naming him by resigning. The law does not contemplate that the edifice thus elaborately raised should be toppled over by such an untimely explosion from within. The salutary purpose of an arbitration is the summary and extra-judicial settlement of controversies between parties. The court should pause before permitting a technical and strained construction of the law or the agreement of the parties to defeat that purpose. If the law or the parties contemplate the posisbility of an endless chain of frustrated arbitrations or the summary termination of the submission when the pen is in the hand of two of the arbitrators to sign an award, the meaning should be unmistakably expressed. It is highly improbable that any arbitration agreement or submission to arbitration would be made if it would involve the parties in such absurd consequences. Laws should be construed sensibly and plain purposes should not be defeated by narrow interpretations.

It follows that the withdrawal of one of the arbitrators on the threshold of a formal award does not end the authority of the other two unless the terms of arbitration submission take the case out of the general rule governing majority awards. The arbitration agreement and the Civil Practice Act should be read in harmony where harmony is possible. Literally, the agreement provides that if an arbitrator ceases to act a substitute arbitrator shall be chosen. But the substitute clause need not be read so crabbedly as to permit an unreasonable result in flat contradiction of the common and statute law. The letter should be enlarged within legitimate bounds, rather than limited, when the end in view may thereby be more effectually accomplished.

Under a fair and equitable interpretation of the submission agreement, a vacancy caused by the withdrawal of an arbitrator need not be filled after the case has been heard, considered and practically decided. The withdrawal at that point does not prejudice the rights of the parties to a hearing before a full board and an award by a majority or make necessary a rehearing of all the allegations and proofs of the parties before a substitute arbitrator.

The orders should be reversed, with costs in all courts, and application to confirm award granted, with ten dollars costs.

CRANE, J. (dissenting). The Arbitration Law is based on contract. There can be no arbitration enforced upon the parties by the courts in the absence of contract. The contract of arbitration is to be construed like any other contract and all its terms and con-

ditions given force and effect unless they are against public policy or illegal. (*Matter of Zimmerman* v. *Cohen*, 236 N. Y. 15.)

Article 2, sections 3 and 4 of the Arbitration Law are based upon a previous existing contract. If the contract provides how an arbitrator shall be appointed in case of failure or neglect of one to act, this method must be pursued. The court acts only on failure of the parties to live up to the contract. There is nothing in the law that prevents the parties from contracting for the appointment of three arbitrators, and that if one should resign after the hearings were closed, and before decision, another should be appointed in his place. In fact, this is what happens in case of death. Should one of three arbitrators die, at the end of the hearings and before decision, another arbitrator, in my opinion, would have to be appointed to take his place. An award by the two living arbitrators would be void.

The result is the same when one of the arbitrators ceases to exist as such by resignation. He is actually dead to the proceeding. The case would be different if his resignation was brought about by the action of the party appointing him, or was done in bad faith. We must assume in this case, after the unanimous affirmance, that Osborn's resignation was in the utmost good faith; and it is conceded that the respondents are not the cause, but the sufferers. They contracted for just such an emergency in the very first paragraph of the arbitration agreement. ". . . In the event that Frank H. Osborn shall refuse to act as such arbitrator or, having accepted the appointment hereunder, shall later cease to act as such arbitrator through death, resignation or otherwise, the parties of the first part shall (1) elect an arbitrator from among the individuals named in the list of 'Proposed Arbitrators,' annexed hereto."

The opinion of this court in my judgment amends and modifies this contract. The resignation of Osborn, it says, must take place before the hearings have ended and not after. There is no such limitation in the contract. The parties have agreed otherwise, and as I have before stated, I do not think the law prevents them from making such an agreement. Such a limitation does not apply, I take it, in case of Osborn's death after a hearing and before decision. Why should there be this limitation in the one instance and not in the other? Of course we must assume that there was the utmost good faith in the resignation. Bad faith changes all things. The cases where an arbitrator deliberately resigns in order to prevent an adverse decision can be dealt with when they arrive. This is not such a case.

The contract having provided for an arbitration, the decision was as important as the hearings. The respondents were entitled to an arbitrator appointed by them to discuss the case and present his views, whatever they were, and both parties were entitled to three arbitrators able to act and functioning as such at the time of the decision, although the majority vote of the three could make the decision. (Civ. Prac. Act, sect. 1453.)

Such is the contract as I read it, which the parties have made. For these reasons I dissent.

HISCOCK, Ch. J., CARDOZO, MCLAUGHLIN, ANDREWS and LEHMAN, JJ., concur with POUND, J.; CRANE, J., reads dissenting opinion.

Orders reversed, etc.

AN APPRECIATION OF LORD CAMDEN'S POSITION IN CONSTITUTIONAL HISTORY.

American lawyers will be interested in the following extract from a little book, recently published by Randolph Greenfield Adams, Assistant Professor of History in Trinity College, North Carolina, entitled "Political Ideas of the American Revolution."

"Constitutionally speaking, the American Revolution meant the rejection by America of what was and is the theory of the British constitution. The British Empire has survived by doing in practice what the Americans asked Parliament to do openly in the period under observation, that is, it has quietly dropped overboard the theory of Parliamentary sovereignty as far as the empire is concerned. The doctrine of Parliamentary supremacy was, as numerous historians have indicated, of comparatively late growth in English constitutional development, and the American Revolution demonstrated that it had no place at all in Britannic constitutional development. The statesmen at Westminster see that today; was there not one statesman at Westminster in the era of the American Revolution who saw that the doctrine of Parliamentary sovereignty could not be maintained if the Empire was to survive? One naturally thinks of Burke and Chatham and of their futile efforts to show Parliament that in the matter of colonial taxation they could not do everything and anything that they desired to do. Yet when all was said and done, both of those men were among the group who held that the British Parliament was an imperial parliament.

"There was one Englishman, however, who had read his Locke, who understood his constitutional law, and who seems almost like a voice crying in the wilderness of parliamentary sovereignty and supremacy. He was Charles Pratt, first Baron Camden, Lord Chief Justice of the Common Pleas (1762-66) and Lord Chancellor of England (1766-70). He seems to have been singularly overlooked by posterity, and one cannot forbear expressing the hope that when his life is written it will be written either by an American or by an Englishman who understands the American view. To Americans, Camden must always be of peculiar interest. He introduced into English law the principle of the common law, that fifty years earlier Andrew Hamilton, of Philadelphia, had fixed in the structure of colonial law by the celebrated Zenger trial at New York. Camden it was whose decision invalidating the use of 'General Warrants' would have gladdened the heart of James Otis, had the colonial courts had the courage to take a like stand in the matter of the writs of assistance. And it was Camden who released John Wilkes on *habeas corpus* after that firebrand had been arrested for his No. XLV of the *North Briton*, an act which caused the solemn reporter of the Common Pleas so far to digress from his function as to note at the end of his report, 'caused a loud huzza in Westminster Hall.' Even old Dr. Johnson was obliged somewhat begrudgingly to admit the popularity of this idol of the Whigs.

"Camden's maiden speech in the House of Lords was an attack on the unsportsmanlike Declaratory Act with which the Rockingham ministry accompanied its repeal of the obnoxious Stamp Act. It deserves careful consideration, . . . that there are some things which Parliament cannot do. 'My Lords,' he began, 'he who disputes the authority of any supreme legislature, treads on very tender ground. In my opinion, the legislature has no right to make this law. The sovereign authority, the omnipotence of the legislature, is a favorite doctrine, but there are some things which you cannot do. You cannot enact anything against divine law. You cannot take away any man's private property without making him compensation. You have no right to condemn any man by bill of attainder without hearing him.' Of those things which Parliament cannot do, the first goes off into that question of natural, i.e., divine, law, which is a story in itself. But the last two are purely questions of human law, in which the speaker was trying to put a rule above Parliament. He went on to argue from the case of Wales, just as John Adams had done. . . ." pp. 126-128.

CHARLES PRATT.
First Earl Camden.

ANOTHER FEDERAL TAX INIQUITY.

The following "Memorandum" has been received by the Editor.

The Revenue Act of 1924 provides with respect to estate tax (Title III, part I, §302 f) that there shall be included in the gross estate of a decedent any property passing under a general power of appointment exercised by him. There are cases of existing trusts for several persons and a provision in the will or trust deed that the trust shall not terminate until the last of those persons dies. When the first person dies and his will exercises the power of appointment, the estate tax is apparently payable within a year thereafter, irrespective of the means of the person exercising the power of appointment. Suppose a case which is not uncommon:— Child No. 1 dies, exercises his power of appointment, and leaves little or no individual estate. The property appointed is large. It is not subject to payment of the estate tax because it is in the hands of trustees who are directed to hold on to it. The necessary result must be that the estate of the person exercising the power of appointment will be rendered insolvent. The provisions for postponement of the tax are not designated to meet this case, nor are they adequate so to do.

The same result may be attained when a person settles property in trust to take effect in possession or enjoyment after his death, or transfers it in contemplation of death. In both these cases the act provides that the value of the property in settlement or transfer shall be included in the gross estate.

It is submitted that it is undesirable to render insolvent the estates of persons dying and exercising powers of appointment, that an amendment to the estate tax should be urged upon the attention of Congress, and that the following might perhaps serve to cure some of the defect:

Proposed Amendment to Title III, Part I, Revenue Act of 1924.

§305 (e). Whenever one or more life estates or any other term less than the fee simple shall be appointed by the exercise by the decedent of a general power of appointment or created by transfer or trust intended to take effect in possession or enjoyment after his death, the value shall be included in the gross estate as required by the provisions of §302 (e) and (f) but shall be divided and the value of each of the successive estates shall be separately set forth

in the executor's return. The tax imposed by Part I of this title shall be due and payable one year after the decedent's death with respect to the value of every such estate the right to the actual possession and enjoyment of which shall accrue to and be vested in any person upon or immediately after the decedent's death. The tax imposed upon the value of every subsequent estate so created shall be due and payable one year after the right to the actual possession and enjoyment thereof shall have accrued to and become vested in any person, but the executor of the decedent's will may apply to the Commissioner to have any such tax on the value of any one or more subsequent estates which will vest in possession and enjoyment at a future time or times ascertained at any earlier date and may pay the tax at any time prior to the date when it shall become due and payable. Whenever the estate of a decedent who has so created successive estates, any of which will vest in possession and enjoyment at a future time, shall have been closed or finally settled in accordance with the law of the State having jurisdiction thereof, any tax which shall thereafter become due and payable under the provisions of this section shall be due from and payable by the person in whom such estate in remainder shall so vest in possession and enjoyment, one year after it shall so vest.

THE ACTIVITIES OF A RETIRED ENGLISH JUDGE.

The report of the Special Commission, reprinted in the February number of the QUARTERLY, recommended the restoration of half pay retirement allowances to judges, who, instead of resigning after reaching the age of seventy, should merely "retire" so that, while freed from continuous active service on the bench, they could still be recalled for temporary service by the chief justice of the court on which they served. In this way they would constitute a reserve judicial force and provide the contributory element at which the legislative policy is aiming.

This suggestion of the Commission was a constructive contribution to the discussion which deserves serious consideration because it combines the contributory element with the practical necessity of providing inducements, for the kind of men we want on the bench, first to accept appointments and then, when the time comes that they may not be capable of effective continuous service, to make room for younger and stronger men without terminating their service entirely. As the bench and bar and legislature have not yet thoroughly visualized the practical value of this suggestion, the following picture of the life of Lord Darling (for many years the wit of the English bench), since his retirement, may prove

"Judicial Light Weight."

The "Spy" Cartoon of Mr. Justice Darling from "Vanity Fair."

illuminating. The account appeared in "The Solicitors' Journal" of July 11, 1925.

"JUDEX EMERITUS.

> "The high esteem in which English judges are held is illustrated by the fact that, when they retire from service on the High Court Bench, they very rarely have finished their career of public usefulness. On the contrary, some sphere of unpaid service is nearly always pressed upon them, a compliment which it must be hard to resist, no matter how much a judge may wish to spend his last years in retirement and meditation. For a retired judge is generally made either a member of the House of Lords or a Privy Councellor; and in both capacities he finds judicial work ready and waiting for him. Again, he may be recalled to help out his old colleagues as an additional first-instance judge in moments when litigation proves exceptionally pressing; and few ex-judges can refuse such a request. Still other service takes the form of appointment as chairman of some important commission or committee enquiry into a matter of legal administration, or a proposal of legal reform. Lord Darling, for instance, has served in all these capacities since his retirement of eighteen months ago. For a couple of terms he returned to the King's Bench almost as a regular member, for he tried cases every day. Again, his name is constantly found in Appeal Cases as that of the Privy Councellor who draws up the judgment of the Judicial Committee in some important appeal at which he has been a member of the court. In the old days, the law-lord or other member of the Judicial Committee charged with this duty actually read the decision of the court; today this has become a mere formality; only the opening words, we understand, are read, and a written copy of the judgment is supplied to the parties. Still again, Lord Darling has been called upon to serve in yet another quasi-judicial capacity; he is presiding over the Committee which is considering the proposals put forward in the Moneylenders' Bill."*

This striking picture reminds us that we have had similar service in recent years from our own former judges. Of the Supreme Judicial Court, Chief Justice Knowlton served as chairman of a public commission; Judge Morton contributed distinguished service in the Constitutional Convention; Judge Sheldon gave us the benefit of his rare qualities as chairman of the Judicature Commission as well as in other ways; and Judge Loring, in the face of

* To add interest we reproduce the "Spy" cartoon of Mr. Justice Darling (as he then was) which appeared in "Vanity Fair" fifteen or twenty years ago.

ill health which makes it a struggle for him, is now rendering public service of a high order as chairman of the Judicial Council.

On the Superior Court, Judge Bell and Judge Fox frequently sat in court to the time of their death and Judge Fessenden also is giving the benefit of his long experience on the bench as a member of the Judicial Council. These facts show that the subsequent voluntary service of our judges is a thing of great public importance which provides a distinct contributory element to the retirement provision suggested by the Commission. Whether this sort of service could or should be made compulsory or not as a condition under the proposed plan, we could expect and rely on enough of it to take the proposed plan out of the "non-contrubutory" class and thus fit it into the "contributory" policy.

F. W. G.

THE NEED OF LEGISLATION TO REQUIRE THE OFFICIAL TABULATION OF THE BLANK BALLOTS CAST UPON QUESTIONS SUBMITTED TO THE VOTERS.

At a time when it is common for lawyers to talk about the gradual disappearance of "fictions" in legal reasoning about certain details of the law, we are apt to overlook the fact that giant fictions in the ordinary thinking of the public about their government have developed in the present era of "collectivism". Groups, "blocks", "associations", "leagues", "propagandists" and their representatives have developed the art of exaggeration for the benefit of a gullible and credulous busy people on an unprecedented scale. In the Constitution of Massachusetts, as in Lincoln's famous phrase "Government of the people, by the people, for the people", the word "people" is used in two different senses, one a general sense and the other a political sense. "Of the people" and "for the people" means all the people including each individual person, man, woman, or child, whether voter or not, now living or yet unborn, whose rights as individuals are protected by the constitution and for whom all the representatives and all the voting people hold their political power in trust. (See Opinion of the Justices, 226 Mass. at pp. 610-11.) On the other hand "by the people", as ordinarily understood, means the "people" in the political sense of *voting* people, for the time being, who go to the polls upon a particular issue and cast a vote.

I have said "as ordinarily understood" because "we, the people", as used in the preambles of the constitutions of the United States and of Massachusetts, has today a larger meaning than is commonly realized.

"The children of 1780 and 1789 and generations of other children grew up to be voters. They learned about the constitutions and lived under them. One of those children was Daniel Webster. Another was Abraham Lincoln. The great majority of millions of American children, as they have grown up, have believed in most of the constitutional rules of Washington and Franklin and the Adamses as good rules to live by. Many of them gave their lives in the Civil War to protect the constitutions and keep the states united, and in the World War to protect them again. So all these children of the past are part of 'we, the people' and we have their struggles and sacrifices and *judgment* to help us. And, as they have helped us, so it is our duty to help those who come after us by understanding and protecting those constitutions."

The words quoted were written for the boys of the Boston Latin School in an attempt to interest them in the study of constitutional history, but they seem pertinent to the present discussion for "grown-ups".

For political purposes, however, we are generally told that "we, the people" and *all* the "people" clearly speak through a majority of the voting "people", even though it is really a small majority of the minority of the voters who take the trouble to vote on men or measures on election day in nasty weather. Many of us thoughtlessly swallow this "fiction" whole. The fact that we hold our political power in trust for the benefit of any one but ourselves or our political interest or whims is, to say the least, often forgotten.

Now that we have the I. and R. and the "Public Opinion" act in the legislative districts and the growing practice of *advisory* voting on a state-wide scale for the *information* (which is often translated, for political purposes, into the idea of *instruction*), for legislators, this "fiction" is becoming more and more threatening to the stability of government and the protection of the rights of individuals and minorities on which our American national character rests.

Under these circumstances, "the wisdom of government" lies in providing all practicable means of informing the representatives and *voting* "people" about the facts of government as an antidote

for the "fictions" that are fed to them.

At the beginning of the last legislative session, a petition was filed representing "that there is need of legislation to provide that the blank ballots cast upon any question submitted to the people to be voted upon at an election shall be reported to, and tabulated by, the Executive Council in their official return of the results of the vote for the information of the public". The petition then prayed for the passage of the accompanying bill or other appropriate legislation. The draft of an act submitted with the petition was as follows:

> "An act to provide for Public Information as to the number of Blank Ballots cast on Questions Submitted to the voters.
>
> "Section one hundred and thirty-two of chapter fifty-four of the General Laws is hereby amended by inserting after the word 'list' in the fourth line thereof the words 'and the number of blank ballots cast upon each question submitted to the voters' and by inserting at the end of said section the words 'and a tabulation of the blank ballots cast in each district on each question so submitted of which a return is made.' "

The bill was numbered "House 831".

The Committee on Election Laws did not report favorably and the legislature referred the matter to the next legislative session. At the hearing before the Committee on Election Laws the reasons for the bill were presented in substance as stated in the following letters, copies of which were sent to several members of the legislature.

FEBRUARY 25, 1925.

"DEAR SIR:

"I should like to call your attention to House 831 and to the reasons for it which I have stated in a letter to the committee, copy of which I enclose.

"Since I understand that the Executive Council receives all the information necessary under the present practice, I do not understand why they cannot have the arithmetic done so that any one who wishes to study the returns can do so without doing a lot of arithmetic. No well-regulated private business organization would go without this kind of information as to its practical operation. The dramatic use of figures which is made in the newspapers after each election with exaggerated statements of the relative vote is in itself an indication of the need of this bill.

"I thought the whole practice was established five or six years ago when they did it on the constitutional amendments, as you will see by referring to the official pamphlet at that time. But they have stopped it for no reason that I can see except that it is a little additional trouble, although the importance of it is constantly increasing with the increasing number of questions on the ballot.

"I hope the legislature will consider it seriously.

Yours very truly,

F. W. GRINNELL."

FEBRUARY 25, 1925.

CHAIRMAN, COMMITTEE ON ELECTION LAWS,
State House, Boston, Mass.

"DEAR SIR:

"For your convenience, I put in writing the substance of my reasons for endorsing House Bill 831, which I presented to your committee the other day, to provide that in the official report by the Executive Council at each election they should tabulate the number of blank ballots cast upon each question submitted to the voters in the same way in which they tabulate the 'Yes' and 'No' votes.

"A considerable amount of discussion took place in regard to this matter several years ago in 1916-17. In tabulating the votes on the various amendments submitted by the constitutional convention in 1918, the Executive Council specifically tabulated the blanks so that any one reading the report could see at a glance how many blank ballots there were in each town for comparison with the tabulated 'Yes' and 'No' votes instead of going through the process of adding and subtracting necessary to work out the number of blanks for himself.

"Personally, I believe it to be a matter of special importance for the information of the public that the blank ballots cast on all questions on the ballot should be carefully tabulated and the results of the popular vote made as easy for the people to understand as possible, as the theory of this whole plan of popular vote on measures is the theory of an electorate informed as fully as possible in regard to the government.

"Under the earlier practice when not only the blank ballots were not tabulated, but the total vote was not stated, I printed in the MASSACHUSETTS LAW QUARTERLY, for the information of those interested, unofficial reports of the blank ballots for the purpose of comparison, but those unofficial reports, of course, were liable to be mistaken in some respects and were much less satisfactory than the official reports made by the Governor and Council. Since the reports on the constitutional amendments above referred to, I supposed that it had become the established practice to tabulate the blank ballots in regard to all such questions for the information of

the public. As already explained, I believe that should be the established practice.

"I am writing this letter solely as an individual expressing my own views and in no sense as representing the Massachusetts Bar Association, which has not acted upon this subject.

"As far as my observation goes, every person who takes a serious interest in the answers to questions on the ballot wants to know, not only the 'Yes' votes and the 'No' votes, but the blanks. He, or she, ought to have it presented in the most convenient, intelligible form possible. Of course under the 'Public Policy' Act a tabulated statement of the blanks is essential for the information of the representative in a district in order that he may understand the nature and extent of the advisory instruction offered him under the express terms of the act.

Yours respectfully,

F. W. GRINNELL."

The importance of this matter for the serious study of the practical working of our system of government seems to be constantly increasing in view of the steadily decreasing proportion of the voters who take the trouble to vote on any subject and the consequently increasing opportunities for the dramatic use in argument of an apparent popular vote which does not always fairly represent the public sentiment of a great majority of the people. The decrease in the percentage of voters is pointed out in the following editorial, which appeared in the "Boston Post" of June 2, 1925.

"WHY WE DON'T VOTE.

"That we had become seriously negligent in going to the polls on election days was obvious enough and was widely commented upon at the last election. Whereas a generation ago, 80 per cent or more of citizens entitled to vote exercised their privilege, in the last two presidential contests only 50 per cent voted.

"It has remained for Simon Michelet, a Washington statistician, to show that we are not only bad voting slackers, but are almost the worst among the leading nations. England in her last two national elections polled 76 per cent in one and 82 per cent in the other. Germany in the last few years under the republic has made returns of from 75 to 82 per cent. In Australia they have averaged 75 per cent for many years and in New Zealand 84 per cent.

"A generation or so ago many foreign observers, among them one of the most notable students of American politics, former Ambassador Bryce, made the criticism that elections were our chief national sport. With Federal, State and municipal officers to elect it was and is almost one continual round of campaigning.

"Perhaps the sport has begun to pall upon us for the reason that we have become satiated with too much opportunity to vote. Yet that does not excuse our too apparent neglect of the suffrage."

F. W. G.

A LITTLE CHAPTER IN PENAL HISTORY.

In view of the current public interest in the problems of "crime" and criminals, the following letter which appeared in the Boston Herald of June 14, 1925, seems worth reprinting.

F. W. G.

TELL THE TRUTH.

To the Editor of the Herald:

The discussion of the penalization of the concealment of facts, in the case of the teacher who kept to herself her marriage, brings to my mind something very different but involving, in a way, the same principle—the new method of dealing with men who are to be released from imprisonment on parole. Formerly such men, generally, kept silence about their past. There was no sign on employment offices, "No ex-convict need apply," but the theory of the outgoing prisoner was that "what his employer doesn't know won't hurt him any." The result was that if he found employment he was at the mercy of unscrupulous former prisoners, who didn't hesitate to blackmail him. "Lend me five dollars, or I'll tell your boss your record," was a very common way of getting money. In many cases the police, in their zeal for the protection of the public, felt under obligation to ask an employer if he knew that he had an "ex-convict" in his employ. Such a question was very likely to be followed by discharge. Or, the question was asked of a fellow-employee, who told others. Perhaps they protested against working with him.

Public sentiment in such matters has changed, greatly in the past few years. The world has come to have more interest in the restoration of fallen men. The word "outcast" is not in as good standing as is was. Much of this change has been due to the new view held by the late Mr Frank Randall, formerly at the head of the prison administration, the chairman of the state board of parole. I well remember the surprise with which the prisoners who were looking forward to parole received his quiet, pleasant suggestion, that "of course, it will be necessary for you to have a job in advance before you can be released," the other members of the board concurring fully.

"But, Mr. Randall, a man can't get a job while he's here; nobody will hire him."

"O, yes, they will, I have had 12 years' experience at the head of an institution, and have released hundreds of men. Write to your relatives and friends to get you work. Write out to your former employers; to anybody you know. Tell the whole truth; that you have turned around, and only ask a chance. Get a letter from anybody saying that he will employ you. It will be verified, and if it is written in good faith you will be allowed to go. It will be understood that your employer will keep the matter to himself."

If the prisoner still thought the terms of release were hard he was reminded that he was going out as a reformed man; a man who could be trusted. "To go back into the world with a lie on your lips, uttered or implied, wouldn't be a good beginning, and it wouldn't be consistent for the board to countenance such deception."

The result of the new policy was such as to commend it. If a man couldn't obtain work, the board endeavored to get it for him. Great numbers of prisoners have found steady work before they were released. The best of it is that the method sets them a high standard, and encourages the self-respect without which no man is likely to be reclaimed and readjusted.

WARREN F. SPALDING.

Cambridge, June 24.

THE RIGHT OF THE DEFENDANT TO "PLEAD OVER" AFTER PLEA IN ABATEMENT IN A CRIMINAL CASE.

After the indictments for manslaughter in the recent "Pickwick Club" case, some, or all of the defendants, filed pleas in abatement raising questions relative to the proceedings before the grand jury. What, if any, merits there may or may not have been in the pleas is immaterial to the present discussion. The proceedings relative to the pleas, however, as reported in the press, caused comment at the bar and, therefore, some statement in regard to the law seems timely.

The prosecuting officer called the attention of the court and of the defendants' counsel to the case of *Com.* v. *Carr*, 114 Mass. 280, which was as follows:

> "The defendant, having been indicted in the Superior Court for a misdemeanor, pleaded in abatement that his name was Bartholomew Carr, and that he was not, and never had been known by the Christian name of Bartley. The Commonwealth replied that he was known as well by the name of Bartley as by the name of Bartholomew. Issue was joined, and the jury found that he was known as well by the name of Bartley Carr as by the name Bartholomew Carr.

> The defendant then moved for leave to plead not guilty. The court refused the motion, and the defendant alleged exceptions.
>
> *Gray, C.J.* All the authorities agree that if one accused of misdemeanor pleads misnomer in abatement, and an issue of fact is joined thereon, and found against him by the jury, he can not, as matter of right, plead over. 2 Hale P. C. 255, 256. *Kinton* v. *Hopton*, Owen 59; S. C. *nom. Kirton* v. *Williams*, Cro. Eliz. 495. *The King* v. *Gibson*, 8 East. 107. *Barge* v. *Commonwealth*, 3 Penn. 262, 264. *Guess* v. *State*, 1 Eng. (Ark.) 147. If his plea in abatement is demurred to, and overruled in matter of law, it is otherwise. *Commonwealth* v. *Golding*, 14 Gray, 49. The rule in cases of misdemeanors is the same as in civil actions. *Young* v. *Gilles*, 113 Mass. 34."

As reported in the press the prosecution in the "Pickwick Club" case then stated that if the pleas in abatement were pressed and the issues of fact raised by them were decided against the defendants he should ask the court to refuse leave to plead over. Counsel for the defendants protested against this position and asked the court to rule on the question whether they would be in a position to plead over under those circumstances. The court declined to make any ruling on the subject, leaving the defendants to take such course as they might be advised, all the defendants being represented by counsel. The defendants then decided to waive their pleas in abatement and go to trial on the merits.

As all the defendants were acquitted, the question involved went no further, except in discussion at the bar.

In the case of *Com.* v. *Goddard*, 13 Mass. 455, referred to by Chief Justice Gray, in which the defendant filed a plea of former conviction, to which the Attorney General demurred, Chief Justice Parker, said:

> "The Attorney-General has also insisted, that the defendant's plea is bad, because he has not pleaded over to the country, as well as ask judgment of the Court on the matter set forth in his bar. And this form, according to Sir Matthew Hale in the place cited by the Attorney-General, seems to be requisite. But none of us recollect this form of pleading in this country; and, if it was ever required, it has gone into disuse. . . . Other passages in Hale render it doubtful. . . . In page 256 of his Hist. Plac. Cor. it is said if defendant plead any matter of fact to the indictment, or plead *autre-fois acquit* or *convict*, he shall plead over to the felony; and, although he doth it not upon his plea, but his plea is found against him, he shall not

> thereby be convict, without pleading to the felony and trial upon it.'
>
> When the plea is found against the defendant, in this country, he will be put to plead again to the indictment, and the trial will proceed as if no previous proceedings had passed."

This passage from the opinion by Chief Justice Parker seems to indicate that in case of an indictment for *felony* the defendant has a right to plead over even after issues of fact raised by the plea are found against him.

As far as the practical question before the court was concerned, which caused discussion at the bar, there does not seem to have been any question for the court to rule upon. If the defendant was entitled to plead over if his plea in abatement was found against him, his right could not be affected by any ruling of the court in advance; if, on the other hand, the rule in *Com.* v. *Carr* extended to felony cases and left the right to plead over in the discretion of the court, the time for the exercise of such discretion would not arrive until after the decision on the pleas in abatement. The defendants were not apparently entitled to an anticipatory ruling on the matter. The position of the court, therefore, as stated in the press, appears to have been a proper one. As a matter of practice, of course, no judge would be likely to refuse leave in a case involving serious penalties even in a misdemeanor case. The case of *Com.* v. *Carr* seems to have been a mere attempt by the defendant to delay matters and it does not apply to felony cases in which the right to plead over seems clear. (Cf. *Com.* v. *Golding*, 14 Gray, 49.)

F. W. G.

A "SCHOOL OF POLITICS."

For Study of the Federal Constitution.

The Massachusetts League of Women Voters, in co-operation with Wellesley College, will hold a School of Politics at the College, October 28th and 29th, for study of the Federal Constitution. The sessions will be held in Alumnae Hall, and among the speakers already engaged are Ex-Senator Beveridge, Assistant Attorney General Mabel Walker Willebrandt, Prof. William B. Munro, of the Department of Government at Harvard, Prof. Edward Ely Curtis, of the Department of History at Wellesley. The School is open to all, men and women alike; the registration fee is $2.00, single admission, 75 cents.